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IN THE

Supreme Court of the United States

SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY, DANN BAND, TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS, BATTLE MOUNTAIN BAND AND ELKO BAND,
Petitioners,

v.

UNITED STATES, WESTERN SHOSHONE NATIONAL COUNCIL AND TIMBISHA SHOSHONE TRIBE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does Rule 60(b)(4) of the Rules of the United States Court of Federal Claims ("RCFC"), providing for relief from a void judgment, require that it be raised within a "reasonable time", contrary to other Courts of Appeals' decisions construing the identical Fed.R.Civ.P. 60(b)(4) and holding that there is no timeliness requirement?

2. Can the Treaty of Ruby Valley be construed under RCFC 12(b)(6) as a matter of law to not confer treaty-recognized title, without regard to the established tenets for interpretation of Indian treaties?

3. Was the statutory "finality" bar of the Indian Claims Commission Act, §22, 25 U.S.C. §70u (1976), in effect after the termination of the Indian Claims Commission ("ICC") on September 30, 1978, such that it could then attach to an ICC judgment even though the conditions of the Statute had not been met at the time of the ICC's termination?

PARTIES TO THE PROCEEDING

The Petitioners in this case consist of Native American tribes, bands and groups, all of whom are part of the Western Shoshone nation, and include South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band and Elko Band. The Respondent is the United States, which is adverse to Petitioner. Also, named as Respondents in accordance with Rule 12.6 of the Supreme Court Rules is another group of Western Shoshone entities that were Appellants in the Court of Appeals, represented by separate counsel, which includes Western Shoshone National Council and Timbisha Shoshone Tribe. These additional Western Shoshone parties are not adverse to Petitioners.

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SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY, DANN BAND, TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS, BATTLE MOUNTAIN BAND AND ELKO BAND,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

The South Fork Band, *et al.* respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. 1a-17a) is an unpublished disposition. The Opinion of the Court of Federal Claims granting the United States' motion to dismiss (App. 18a-41a) is reported at 73 Fed. Cl. 59.

JURISDICTION

The judgment of the Court of Appeals (App. 1a) was filed on May 22, 2008. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

RULE AND TREATY INVOLVED

The Treaty with the Western Shoshone, 1863, 18 Stat. §689 (the "Treaty of Ruby Valley"), is set forth in the Appendix at 44a-48a.

This Petition concerns RCFC 60(b), which provides in its entirety as follows:

> **(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under RCFC 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or

taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

This case involves a challenge to a judgment of the Indian Claims Commission as void for lack of due process, and the assertion of rights arising under an Indian treaty that have not before been litigated nor adjudicated. In affirming the Court of Federal Claims' dismissal of all claims brought by the South Fork Band *et al.* pursuant to RCFC 12(b), the Federal Circuit Court of Appeals has (i) construed RCFC 60(b)(4) concerning a void judgment in a manner that raises a direct conflict with the interpretation of other Courts of Appeals of the identical Fed.R.Civ.P. 60(b)(4); and (ii) effectively stripped the Treaty of Ruby Valley of all existing rights, duties and obligations, at the pleading stage of this case as a matter of law.

The Treaty of Ruby Valley established the boundaries of the Western Shoshone land, and as alleged by South Fork Band *et al.*, conferred the equivalent of fee title ownership of this land to the Western Shoshone. (App. 67a-68a, ¶¶ 19-23). It did so in ex-

change for certain privileges of use and access to the land set forth in the Treaty, including the protection of routes of travel, railway, telegraph and stage lines, and the right to establish ranching, mining and agricultural settlements. (App. 67a-69a, ¶¶ 19-27).

A petition was brought in 1951 by the Te-Moak Band of Western Shoshone Indians in the Indian Claims Commission ("ICC"). While this proceeding was still pending the Te-Moak Band terminated its counsel, the Barker Law Firm, which was not acting in accordance with its instructions and not seeking to further Western Shoshone interests. (App. 69a-70a, ¶¶ 29-33). The Bureau of Indian Affairs and the ICC rejected this discharge of counsel, and the law firm remained in the case against the will of the Te-Moak Band and other Western Shoshone entities, representing a de facto petitioner, the "Western Shoshone Identifiable Group".[1] (App. 70a-71a, ¶¶ 34, 35).

The ICC issued an Opinion finding that Western Shoshone aboriginal title had been extinguished to approximately 24 million acres of land. It ultimately awarded $26.1 million in compensation without prejudgment interest for the land and the value of minerals removed from the land, based on a taking

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[1] The South Fork Band *et al.*'s Second Amended Complaint alleges that, upon information and belief, after the Te-Moak Band terminated the Barker Law Firm, this counsel nonetheless remained in the case purportedly representing the interests of the "Western Shoshone Identifiable Group" when, upon information and belief, these lawyers in fact had no representative, decision making client other than the Bureau of Indian Affairs. (App. 71a ¶ 35). In this manner, the case proceeded to judgment against the will of the Western Shoshone petitioners and contrary to the interests of the Western Shoshone people, resulting in a judgment that caused great damage to valuable treaty rights.

date of July 1, 1872. (App. 72a-73a,¶¶ 39-42). A judgment was subsequently issued in that amount, which was certified by the Court of Claims for payment on December 6, 1979 (the "ICC judgment"). At that time, the Indian Claims Commission had been dissolved, and the "finality" provision of the Indian Claims Commission Act ("ICCA"), §22, had been omitted and withdrawn from the United States Code. (App. 73a, ¶ 44). No report to Congress was made of the judgment pursuant to ICCA §22(a). (App. 74a, ¶ 45).

The Court of Appeals decided three issues in affirming the dismissal of all claims, and has thus denied the Western Shoshone any and all rights under the Treaty of Ruby Valley as a matter of law at the pleading stage. In dismissing the South Fork Band *et al.*'s claims under RCFC 60(b)(4), the Court of Appeals interpreted this Rule in conflict with the well-reasoned decisions of other Courts of Appeals. The Court of Appeals in this case dismissed the South Fork Band *et al.*'s claim to treaty title contrary to established tenets of treaty construction that render these claims particularly insusceptible to disposition as a matter of law on a motion to dismiss. Finally, in dismissing the South Fork Bank *et al.*'s other treaty based claims, the Court of Appeals applied the finality provision of § 22 of the ICCA without regard to whether this provision had survived the dissolution of the ICC.

1. Claims Alleged In This Action

The operative pleading of the South Fork Band *et al.* filed in the Court of Federal Claims is the Second Amended Complaint, which sets forth five claims for

relief.[2] Count I seeks a declaration that the ICC judgment is void pursuant to RCFC 60(b)(4). (App. 74a-76a). It is alleged that the ICC judgment was issued in an absence of due process, under circumstances which tainted the proceeding with a conflict of interest and left the interests of the Western Shoshone people unrepresented in the proceeding. (App. 69a-71a, 74a-75a, ¶¶ 29-35, 49-50).

Count II of the Second Amended Complaint is in the alternative to Count I, and seeks a declaration that the Western Shoshone are entitled to prejudgment interest on the award set forth in the ICC judgment. This claim is based upon the Western Shoshone's assertion of treaty title to the subject land under the Treaty of Ruby Valley, the taking of which would entitle the Western Shoshone to prejudgment interest under the Fifth Amendment. (App. 66a-69a, 76a, ¶¶ 12-28, 58-59). The pleading alleges treaty title, as follows:

> Under the Treaty of Ruby Valley, the Western Shoshone Nation granted the United States

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[2] The South Fork Band *et al.* originally filed their claims in the District Court for the District of Columbia. The District Court granted the United States' motion to transfer venue, splitting the claims and transferring those alleged under Quiet Title Act, 28 U.S.C. § 2409a, to the District of Nevada, and transferring all other claims, including those seeking relief from the ICC judgment and declaratory relief concerning rights under the Treaty of Ruby Valley, to the Court of Federal Claims. *See Western Shoshone National Council v. United States*, 357 F.Supp. 2d 172 (D.D.C. 2004). The claims under the Quiet Title Act transferred to the District of Nevada were subsequently dismissed by that Court and the dismissal was affirmed on appeal. The claims under the Quiet Title Act are now the subject of a separate Petition for Writ of Certiorari pending at case no. 08-100.

> certain privileges for use of and access to the land described in the Treaty and, in exchange, the United States recognized Western Shoshone ownership of the land which under U.S. law equates to statutory or fee title.

(App. 68a, ¶ 23).

It is further alleged that the issue of treaty title was never actually litigated in the ICC, and no judgment or order was ever issued deciding whether the Treaty of Ruby Valley conferred treaty title. (App. 70a-73a, ¶¶ 31-38, 43). Rather, the ICC litigated the extinguishment of aboriginal title to approximately 24 million acres of land, as of the stipulated date of July 1, 1872. (App. 70a-71a, ¶¶ 31, 33, 34, 36, 37). The Treaty of Ruby Valley, which was proclaimed just a few years prior to that stipulated date, delineated 60 million acres of land within the Western Shoshone's boundaries. (App. 66a-67a, ¶¶ 16, 19). The ICC did not consider nor adjudicate treaty title to this land, nor aboriginal title outside the 24 million acre tract addressed in the ICC case. (App. 71a-72a, ¶ 38).

Counts III-V of the Second Amended Complaint assert other rights under the Treaty of Ruby Valley, including a right to royalties and for breach of fiduciary duties. (App. 77a-80a, ¶ 65-81).

2. Court of Federal Claims Proceeding

The Court of Federal Claims dismissed all Counts of the South Fork Band *et al.*'s pleading. It first dismissed the Count I claim for relief from a void judgment under RCFC 60(b)(4), holding that such a claim must be brought within a "reasonable time":

> While other circuits may reject time limits for Fed.R.Civ.P. 60(b), the Court of Claims made

> plain that motions challenging ICC procedures filed under Ct.Cl. Rule 152(b) (now RCFC 60(b)) must be filed within a reasonable time. *E.g. Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1089 (Ct.Cl.1981). This determination is binding upon this Court. As the Federal Circuit made clear, "[t]here can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims." *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353 (Fed.Cir. 2006) (citations omitted); *see also Strickland v. United States*, 423 F.3d 1335, 1338 & n.3 (Fed. Cir. 2005). Therefore, to be timely, this motion must be filed within a reasonable time. In this case, the Court of Claims affirmed the ICC judgment in 1979. *Temoak Band of Western Shoshone Indian, Nev. v. United States*, 593 F.2d 994 (Ct. Cl. 1979). Further, it appears that all of the procedural defects alleged by the South Fork Band took place before that date. Assuming that this Court could base its reasonableness determination on the district court complaint filed in September 2003, Plaintiffs would have to show that the 24 year delay was reasonable. They have failed to do so.

(App. 24a). The Court thus acknowledged the conflict with other Circuits in imposing a "reasonable time" requirement under RCFC 60(b)(4), and thereby giving life to an allegedly void judgment.[3]

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[3] The Court of Federal Claims continued in *dicta* to hold that even if the claim were filed timely, it should be dismissed for failure to state a claim under RCFC 12(b)(6). In this regard, the Court found as a matter of law that the South Fork Band *et al.*

The Court of Federal Claims dismissed Count II, holding that the Western Shoshone were not conferred treaty title under the Treaty of Ruby Valley. Count III for royalties under the Treaty of Ruby Valley was dismissed as barred under the finality provision of ICCA § 22. The Court of Federal Claims dismissed the Count IV claim for an accounting for lack of subject matter jurisdiction, despite the argument that this claim was ancillary to the claims in Count III and V for money damages. The Court further held that this claim fell along with its decision to dismiss Counts III and V. The Court dismissed Count V based on the generally applicable statue of limitations, 28 U.S.C. § 2501.[4]

3. The Federal Circuit Court of Appeals Decision

The Federal Circuit affirmed the dismissal of all Counts of the South Fork Band *et al.*'s Second Amended Complaint, on three grounds. First, it agreed with the Court of Federal Claims that a claim under RCFC 60(b)(4) attacking a judgment as void must be brought within a "reasonable time", and that this action did not satisfy that timeliness requirement. (App. 9a-11a). Second, it held that "[b]ecause

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had failed to present "any evidence that would show a grave miscarriage of justice. . . ." (App. 28a). The South Fork Band *et al.* challenged this ruling on appeal, noting that Rule 12(b)(6) is not the place for evidentiary determinations. The Federal Circuit Court of Appeals expressly did not reach this issue on the basis of its holding that Count I was untimely under RCFC 60(b)(4). (App. 12a).

[4] The Federal Circuit, in contrast, held that Counts III through V all failed under the ICCA finality provision, § 22, 25 U.S.C. § 70u (1976), and did not address any other grounds for dismissal.

the Treaty of Ruby Valley did not recognize that the Western Shoshone held fee title in the disputed territory, this Court agrees with the Court of Federal Claims that Count II fails to state a claim under RCFC 12(b)(6)." (App. 15a). The Federal Circuit Court of Appeals thus construed the Treaty as a matter of law against the Western Shoshone to reject treaty title. Third, the Court of Appeals held that Counts III-IV, asserting other rights under the Treaty of Ruby Valley, all fail under the finality provision of the ICCA. The Federal Circuit thus held that any rights the Western Shoshone may assert under the Treaty of Ruby Valley were extinguished as a result of the ICC judgment or nonexistent as a matter of law. (App. 15a-17a).

4. Basis for Federal Jurisdiction

The Court of Federal Claims had jurisdiction over this matter because the claims at issue arose under the Tucker Act, 28 U.S.C. § 1491(a)(1). This is a civil action for money damages and ancillary relief brought by Indian tribes, bands and individuals, and arises under the Constitution, treaty with the United States, and federal law. In particular, the claims alleged in the Court of Federal Claims touch upon the validity of a judgment issued in a federal proceeding, and affect rights under the Treaty of Ruby Valley of 1863 between the United States and the Western Shoshone.

REASONS FOR GRANTING THE PETITION

This case raises issues of great importance that have not been addressed by this Court.

First, the Federal Circuit Court of Appeals held that a request for relief declaring a judgment void

under RCFC 60(b)(4) must be brought within a reasonable time. This creates a direct conflict with the decisions of other Courts of Appeals interpreting the identical Fed.R.Civ.P. 60(b)(4), which have held that there is no time limit to declaring a judgment void.

Second, the Court of Appeals has rendered an interpretation of the Treaty of Ruby Valley as a matter of law at the pleading stage that adversely affects substantial rights claimed under the Treaty. The Treaty rights asserted in the pleading in this case have not before been litigated or adjudicated, particularly the issue of "treaty" title under the Treaty of Ruby Valley. Treaty rights have the force of statute as well as of contract. *See Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 457 (7th Cir. 1998) ("treaties between the United States and Indian tribes are congressional acts akin to statutes"). This matter is thus one of great importance, critical to the quality of life and well being of the Western Shoshone people.

Third, the Court of Appeals has denied the Western Shoshone' rights under the Treaty of Ruby Valley, including royalties arising from the exercise of mineral rights, on the basis of a statutory "finality" provision, ICCA §22, which was no longer in effect at the time it was supposedly triggered by the U.S. Court of Claims' certification of the ICC judgment on December 6, 1979. This decision raises issues concerning the interpretation and effect of the congressional act directed at the dissolution of the Indian Claims Commission in 1976, which have not before been decided by this Court. For the same reasons, given the impact of those provisions on

substantial treaty rights, this is a matter of great importance.

Given that the three issues decided in this case by the Court of Appeals either give rise to a direct conflict with other Courts of Appeals on an important matter, or concern matters of substantial rights under the Treaty of Ruby Valley that have not previously been decided by this Court, the time is now ripe for this Court to address and settle these issues.

I. THE COURT OF APPEALS' DECISION LIMITING RULE 60(b)(4) IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

RCFC 60(b) provides in relevant part as follows:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void; . . . The motion shall be made within a reasonable time, . . .

Subpart (4) of Rule 60(b) has been set apart and distinguished by the federal courts from the other grounds for relief under Rule 60(b).[5] *New York Life Ins. Co. v. Brown*, 84 F.3d 137, 142-143 (5th Cir. 1996). It is necessarily treated specially because of the meaning and effect of a void judgment, which must be considered a nullity:

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[5] RCFC 60(b)(4) is for present purposes identical to Fed.R. Civ.P. 60(b)(4). *See Patton v. Secretary of the DHHS*, 25 F.3d 1021, 1024 n. 4 (Fed. Cir. 1994) ("RCFC 60 is a virtual duplicate of the Fed.R.Civ.P. 60").

> Rule 60(b)(4) allows district courts to "relieve a party . . . from a final judgment" because the judgment is void. We typically review district court orders denying Rule 60(b) relief for abuse of discretion. *CJC Holdings, Inc. v. Wright & Lato, Inc.*, 979 F.2d 60, 63 (5th Cir. 1992). ***"When, however, the motion is based on a void judgment under rule 60(b)(4), the district court has no discretion—the judgment is either void or it is not."*** *Recreational Prop, Inc. v. Southwest Mortgage Serv. Corp.*, 804 F. 2d 311, 313 (5th Cir. 1986); 11 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2862 (2d ed. 1995). ***"[T]here is no time limit on an attack on a judgment as void.*** The one-year limit applicable to some Rule 60(b) motions is expressly inapplicable, and even the requirement that the motion be made within a 'reasonable time, 'which seems literally to apply to motions under Rule 60(b)(4), cannot be enforced with regard to this class of motion." *Briley v. Hidalgo*, 981 F. 2d 246, 249 (5th Cir. 1993) (quoting 11 Charles Alan Wright, Arthur R. Miller and May Kay Kane. *Federal Practice and Procedure* § 2862 (1973)).

New York Life, 84 F.3d at 142-43 (emphasis supplied). *Accord Carter v. Fenner*, 136 F.3d 1000, 1006 (5th Cir. 1998); *Orner v. Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994); *Austin v. Smith*, 312 F.2d 337, 343-44 (D.C. Cir. 1962) ("[u]nder subsection (4) above, the only question for the court is whether the judgment is void; if it is, relief from it should be granted"); *see also Ruddies v. Auburn Sports Plug Co.*, 261 F. Supp. 648 (S.D.N.Y 1966) ("a void judgment can acquire no validity because of laches on the part of one who applies for relief from it").

In other words, a valid, enforceable judgment cannot spring from a void judgment. The passage of time cannot affect such a judgment. The case law setting forth this interpretation of Rule 60(b)(4) is well grounded in logic and policy. It is a long-standing principle of the federal courts under Rule (60)(b). *See e.g. Crosby v. The Broadstreet Co.*, 312 F.2d 483, 485 (2d Cir.), *cert. denied*, 83 S.Ct. 1300 (1963) (granting relief from 30 year old judgment as void under Rule 60(b)(4) on grounds that it is a prior restraint of speech in violation of the First Amendment); *Austin*, 312 F.2d at 343 (declaring judgment void after four years); *see also* Wright & Miller, 11 *Fed. Prac. & Proc.* 2d §2862 (2008) (citing authorities for principles that the Court has no discretion with regard to relief under Rule 60(b)(4) and that there is no time limit in seeking such relief).

Despite this authority, the Federal Circuit Court of Appeals and Court of Federal Claims in this case held that a request for relief under Rule 60(b)(4) must be made within a "reasonable time". They based this decision on *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087 (Ct. Cl. 1981). In *Pueblo*, the Court of Claims denied relief under Rule 60(b) to an Indian tribe from a stipulation entered in an ICC proceeding. It is not at all clear from the Court's opinion in *Pueblo* that the application for relief before the Court was based on Rule 60(b)(4), and indeed, it may very well have been based on Rule 60(b)(1) ("mistake, inadvertence, surprise, excusable neglect") or 60(b)(3) ("fraud, misrepresentation, or other misconduct of an adverse party"). Nonetheless, the relief sought in the present case is clearly under Rule 60(b)(4), and the Federal Circuit's decision holding that *Pueblo* is controlling and imposes a "reasonable time" requirement under Rule 60(b)(4)

relief is squarely at odds with the established decisions in other Courts of Appeals which reject a time limitation under Rule 60(b)(4).

The Court of Appeals in this case noted that, in the absence of decision on the issue by the Supreme Court, it was bound by the precedent of the Court of Claims. (App. 10a-11a). *See First Hartford Corp. Pension Plan & Trust v. United States*, 194 F.3d 1279, 1290 n.3 (Fed. Cir. 1999) ("[w]e recognize that both we and the Court of Federal Claims are bound by the decisions of the Court of Claims, this Court's predecessor Court"); *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353 (Fed.Cir. 2006) ("[t]here can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our Court and our predecessor court, the Court of Claims"). The Court of Appeals in this case further rejected the interpretation of Rule 60(b)(4) rendered by other Courts of Appeals imposing no time limit, noting that "[t]his Court detects nothing in the record or arguments in this case that compel departure from the rule and guidance in *Pueblo of Santo Domingo*." (App. 11a). This issue of whether a "reasonable time" limit should be imposed on a request for relief under Rule 60(b)(4) has not before been addressed by the Supreme Court, and as a result of the Federal Circuit Court of Appeals' decision, there is now a direct conflict among the Courts of Appeals that is ripe for this Court's review.

In *Pueblo of Santo Domingo*, the Court of Claims supported its decision to impose a timeliness requirement by noting that "[t]ime is now of the essence since Congress has expressed its desire that the special Indian claims litigation be wound up by having terminated the operations of the ICC in

1978." 647 F.2d at 1089. The Federal Circuit Court of Appeals in this case quotes this language in imposing a timeliness requirement on the Western Shoshone under Rule 60(b)(4). (App. 10a). Yet it should not be a matter of debate that Rule 60(b)(4) is a rule of neutral application. It applies to all parties litigating in the federal courts equally. It should not be interpreted more narrowly, nor more harshly, against Indian parties.[6] Accordingly, the Federal Circuit Court of Appeal's decision to deviate from the logic and policy established in other Courts of Appeals in interpreting Rule 60(b)(4), by seemingly crafting the rule to deny a constitutional right specifically to Indian parties, warrants this Court's attention and review.

Rule 60(b)(4) is properly invoked in this case to challenge a judgment on grounds of due process of law. A judgment is void where the issuing court acted in a manner inconsistent with due process. *Bridgham by Libby v. Secretary of Dep't of Health and Human Services*, 33 Fed. Cl. 101, 107 (1995). The South Fork Band *et al.* claims in this case that the ICC's judgment lacked due process of law because the Bureau of Indian Affairs and the ICC prevented the petitioners in that proceeding from terminating their counsel during the case. That counsel proceeded to judgment, against the wishes and interests of the petitioners and the Western Shoshone people, representing a fictional entity, the "Western Shoshone Identifiable Group". As a result, the proceeding was therefore tainted, raising serious ques-

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[6] Additionally, the interest of expediency is not a legitimate basis to validate a judgment that should otherwise be declared void for lack of due process.

tions of conflict of interest and due process. (App. 70a-71a, ¶¶ 33-35).

Specifically, the Barker Law Firm, counsel of record in the ICC proceeding for the petitioning Te-Moak Band,[7] was not acting in accordance with its clients instructions by continuing to pursue a claim that the Western Shoshone land was taken by the United States and aboriginal title to the land at issue extinguished.[8] (App. 70a, ¶ 33). The Te-Moak Band terminated the Barker Law Firm and filed a notice of discharge of counsel with the ICC that was not recognized by the ICC. The Bureau of Indian Affairs refused to accept this discharge and renewed the contract of the Barker Law Firm to represent the Western Shoshone. (App. 70a-71a, ¶¶ 33, 34). The United States and the ICC, adversely to the Western Shoshone, thus forced attorneys upon the Western Shoshone who continued at that point to proceed in the case contrary to the express wishes and interests of the Western Shoshone, and upon information and belief, had no representative, decision-making client other than the Bureau of Indian Affairs. (App. 70a-71a, ¶¶ 33-35). In this manner, the proceeding plowed forward in the ICC to judgment, which was superficially in the Petitioners' favor but caused great

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[7] The Petitioner in the ICC Proceedings, docket no. 326, is identified as the "Te-Moak Band of Western Shoshone Indians, Nevada, suing on behalf of the Western Bands of the Shoshone Nation of Indians." *Shoshone Tribe of Indians v. United States*, 11 Ind. Cl. Comm. 387, 418 (1962).

[8] As alleged in the South Fork Band et al.'s Second Amended Complaint, the claim of extinguishment was inconsistent with the Western Shoshone people's use and occupancy of the land. (App. 68a, ¶ 22).

damage to their rights and interests in land under the Treaty of Ruby Valley.

The problem of counsel for an Indian tribe seeking a judgment in the ICC against the will and interests of its petitioning client was endemic to the representation of Indian tribes in the ICC, and was particularly egregious in this instance. In essence, it was in the interests of the tribe's attorneys and the United States to have a judgment extinguishing title as of a historic date, yet such a judgment was typically contrary to the interests of the tribe. Judge Nichols of the Court of Claims explained the serious nature of this problem of conflict of interest when attorneys purportedly representing a tribe act, as the Barker Law Firm did here, without regard to the extinguishment of title to the tribe's lands to the ultimate detriment of their client:

> Unfortunately the machinery of the Indian Claims Commission Act is such as to generate conflicts of interest. One of many such situations is the one asserted here, i.e., the attorney's interest, but not the tribe's is to effect a judicial sale, as it were, of tribal land at values of some historic past date, not of the present, to be set by the Commission, whether or not the Indians may in reality ever have had their title extinguished except by the ICC proceeding itself.
>
> * * *
>
> One conflict long tacitly ignored in ICC cases is that the counsel's interest on the usual contingent fee basis turns only on the amount of award to be extracted from defendant; yet the tribe's interest is not only in the amount of the award, but also in minimizing what land title or

> claim thereto it has to give up, which may be substantial.

Pueblo of Santo Domingo, 647 F.2d 1090-91 (Nichols, J. dissenting).

The pleading in this case challenges on due process grounds the proceedings that resulted in the ICC judgment. The facts alleged present serious and flagrant due process violations. Whether the Western Shoshone petitioners had been accorded due process in the ICC has not before been litigated, and the issue is one of great importance which should be reached on its merits.[9]

II. IN INTERPRETING THE TREATY OF RUBY VALLEY AS A MATTER OF LAW AGAINST THE WESTERN SHOSHONE, THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The operative pleading in this case alleges facts demonstrating that the Treaty of Ruby Valley conferred recognized title, also known as treaty title, on the Western Shoshone. (App. 65a-69a). "Treaty"

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[9] Attempts were made in the 1970's to avoid issuance of the ICC judgment through a motion to intervene by a Western Shoshone entity not recognized by the United States, and by motion to stay brought by the Te-Moak Band. (App. 5a). *See Western Shoshone Legal Def. & Educ. Ass'n v. United States*, 35 Ind. Cl. Comm. 457 (1975), *aff'd* 531 F.2d 495 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976); *Te-Moak Band of Western Shoshone Indians v. United States*, 593 F.2d 994 (Ct. Cl. 1979). The instant case, however, is the first attempt to challenge the ICC proceeding and judgment on due process grounds pursuant to Rule 60(b)(4).

title connotes a traditional and common understanding of title, *i.e.* fee title.[10] *Miami Tribe of Oklahoma v. United States*, 146 Ct. Cl. 421, 175 F. Supp. 926 (Ct. Cl. 1959). "'Treaty-recognized title' is a term that refers to Congressional recognition of a tribe's right permanently to occupy land. It constitutes a legal interest in the land and, therefore, could be extinguished only upon the payment of compensation." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voight*, 700 F.2d 341 (7th Cir. 1983) (citing *United States v. Sioux Nation of Indians*, 448 U.S. 371, 415 n. 29 (1980)).

Whether the Treaty of Ruby Valley confers treaty title is generally a question of fact, not subject to dismissal at the pleading stage pursuant to Rule 12(b)(6). This is due to the unique nature of Indian treaties, which give rise to special rules of interpretation. "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *State of Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979). Treaties are accorded special rules of contract interpretation: "[T]reaties are to be interpreted liberally in favor of the Indians, . . . and treaty ambiguities to be resolved in their favor." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 194 (1999). In *State of Washington*, this Court elaborated on this rule of liberal interpretation:

> Accordingly, it is the intention of the parties, and not solely that of the superior side, that must

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[10] Treaty title should be distinguished from aboriginal title, which is not a property interest, but instead a possessory interest not recognized as ownership by Congress. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279 (1955).

> control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side. "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indian." *Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 5, 44 L.Ed. 49.

Id. 443 U.S. at 675-76. Consistent with this reasoning, "[c]ourts have uniformly held that treaties must be liberally construed in favor of establishing Indian rights." *United States v. State of Washington*, 135 F.3d 618, 630 (9th Cir. 1998). How the Indians may have understood the treaty can be discovered from "the history of the treaty, the negotiations that preceded it, and the practical construction given the treaty by the parties. In sum, the treaty is to be interpreted to attain the reasonable expectations of the Indians." *United States v. Top Sky*, 547 F.2d 486, 487 (9th Cir. 1976) (citations omitted). With regard to the issue of whether a treaty confers recognized title, there are no "magic" words or special language that would typically allow this issue to be decided on the basis of the treaty language alone. *Miami Tribe of Oklahoma v. United States*, 175 F. Supp. 926 (Ct. Cl. 1959) ("there exists no one particular form for such Congressional recognition or acknowledgment of a tribe's right to occupy permanently land and that right may be established in a variety of ways").

Contrary to these tenets of construction, the Federal Circuit Court of Appeals decided as a matter of law that the Treaty of Ruby Valley did not confer treaty title on two grounds: (1) a 1945 Supreme Court decision, *Northwestern Bands of Western Shoshone Indians v. United States*, 324 U.S. 335 (1945), which rejected a claim of aboriginal title under a different treaty, the Treaty of Box Elder, that is distinguishable from the Treaty of Ruby Valley; and (2) a finding that there is no language in the Treaty of Ruby Valley "that suggests that the Union intended to convey title to the Western Shoshone." (App. 14a).

In its analysis of these two grounds, the Court of Appeals in this case turns the construction of Indian treaties on its head, examining the Treaty from the viewpoint of the expectations of the United States, and effectively imposing a presumption against the Western Shoshone. In *Northwestern Bands*, a 5-4 decision, the Court determined that the Box Elder Treaty, 13 Stat. 663, did not confer aboriginal title. Among other distinctions between the Box Elder Treaty and the Treaty of Ruby Valley, the Box Elder Treaty contained an amendment which would seem to foreclose the recognition of title:

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

Northwestern Bands of Shoshone Indians v. United States, 95 Ct. Cl. 642 ¶ 17 (1942), *aff'd on other grounds*, 65 S. Ct. 690 (1945) (quoting amendment added to Box Elder and other treaties, but not to

Treaty of Ruby Valley). The Treaty of Ruby Valley did not contain the determinative language found in the Box Elder Treaty or anything comparable to it.[11] The Box Elder Treaty stated expressly that title was *not* conveyed in the land boundaries language of the treaty. It may be inferred with regard to the Treaty of Ruby Valley that based on the absence of this clause the intent was to convey recognized title to the described land.

The Court of Appeals in this case reads a reference to the Treaty of Ruby Valley in the *Northwestern Bands* opinion overbroadly as foreclosing a claim to treaty title. Yet in that case, the tribal parties were different, the treaty was different, and the issue before the Court, concerning aboriginal title rights, was different. The opinion in *Northwestern Bands* thus should not serve as a basis to short circuit the treaty interpretation analysis compelled under the precedent of this Court.[12]

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[11] The Court of Federal Claims relied upon *dicta* in the Supreme Court's *Northwestern Bands* opinion referencing the Government's treaties with other Shoshone Tribes, including the Treaty of Ruby Valley. 342 U.S. at 343. This dicta should not serve as the basis for a dismissal as a matter of law on the issue of recognized title.

[12] The Court of Appeals found, solely on the basis of the *Northwestern Bands* opinion, that the "United States actions after adopting the Treaty are inconsistent with an interpretation that the Treaty of Ruby Valley conveyed title." (App. 14a). Approaching the interpretation of the Treaty from the viewpoint of the United States, as the Court of Appeals did here, is contrary to the basic tenets of treaty construction. Additionally, there is nothing to indicate that the United States was not simply acting in accordance with the various privileges provided by the Western Shoshone in the land under the express terms of the Treaty.

In *Crow Tribe of Indians v. United States*, 151 Ct. Cl. 281, 284 F.2d 361 (1960), the Court held that the Treaty of Fort Laramie of 1851, 11 Stat. 749, conferred recognized title on the plaintiff tribe where the language setting forth boundaries was comparable, if not weaker, than the language in the Treaty of Ruby Valley. *Id.* at 363-364. The Court's determination was based, in substantial part, on the tribe's agreement to cease attacks on settlers traversing its territory and to take responsibility for such acts:

> It is true that the language of the Treaty is not the technical language of recognition of title. Nevertheless, we think that the participation of the United States in a treaty wherein the various Indian tribes describe and recognize each others' territories is, under the circumstances surrounding this treaty, and in light of one of the overriding purposes to be served by the treaty, i.e., securing free passage for emigrants across the Indians' lands by making particular tribes responsible for the maintenance of order in their particular areas, a recognition by the United States of the Indians' title to the areas for which they are to be held responsible, and which are described as 'their respective territories.'

Id. at 363 (internal quotations and citations omitted).

The United States entered into the Treaty of Ruby Valley for the same rationale of securing free passage to the western frontier. The Western Shoshone agreed in the Treaty to cease hostilities "within their country", and assured the protection of the traveling settlers "without molestation or injury from them." (App. 44a). Article 5 of the Treaty of Ruby Valley specifically describes over 60 million acres of land

"claimed and occupied" by the Western Shoshone. As alleged in the South Fork Band *et al.*'s pleadings, in exchange for the recognition of this land base by the United States, the Western Shoshone nation gave the United States the right to mine and otherwise exploit the Western Shoshone land. (App. 45a, Arts. 3 and 4). This includes the Western Shoshone's agreement to protect routes of travel, railway, telegraph and stage lines through the described Western Shoshone land, and the right to establish ranching, mining and agricultural settlements on this land. (App. 44a-45a, Arts. 2-4; App. 67a-69a, ¶¶ 19-27). The language of the Treaty is, at worst, ambiguous on whether the Treaty confers recognized title. As a result, resort is necessary to the tenets of treaty interpretation, and the issue is not amenable to disposition on a Rule 12(b)(6) motion to dismiss.[13] The Court of Appeals in this case disregarded the basic tenets of treaty construction in dismissing the claim to treaty title. This issue of whether the Treaty of Ruby Valley confers treaty title has not been raised before, nor addressed by this Court in *Northwestern Bands* or any other decision. Yet it is an important question of federal law, having an enormous impact on the rights of the Western Shoshone people. The issue should accordingly be settled by this Court.

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[13] This is also demonstrated by the fact that a government official at one time acknowledged that the Treaty of Ruby Valley conferred recognized title. (App. 81a, November 1975 Memo of William L. Benjamin, Director's Office of Trust Responsibilities for the BIA, included in record in both Court of Federal Claims and Federal Circuit).

III. WHETHER THE "FINALITY" PROVISION OF THE ICCA, § 22, REMAINED IN EFFECT TO FIRST ATTACH TO A JUDGMENT AFTER THE ICC WAS DISSOLVED EFFECTIVE SEPTEMBER 30, 1978, IS AN ISSUE OF GREAT IMPORTANCE WHICH SHOULD BE SETTLED BY THIS COURT

The Court of Appeals in this case decided as a matter of law that the "finality" provision of the ICCA, §22, 25 U.S.C. §70u (1976), barred a claim for royalties, as well as any other assertion of rights under the Treaty of Ruby Valley, by virtue of the ICC judgment.[14] This "finality" provision states as follows:

> (a) . . . The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.
>
> (b) A final determination against a claimant made and reported in accordance with this Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

25 U.S.C. § 70u (1976) (App. 54a). The statutory bar provided by § 22 is substantially broader than that provided by the common law doctrines of res judicata and collateral estoppel, which typically govern the

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[14] The Court of Appeals' decision is premised on the validity of the ICC judgment and assumes that all Western Shoshone rights in land were extinguished as of 1872, pursuant to its decision affirming dismissal of Counts I and II. (App. 15a-16a).

effect of a prior judgment.[15] As a result, the issue of whether the bar of § 22 is operative in this case substantially affects the analysis of rights available to the Western Shoshone under the Treaty of Ruby Valley.

Congress in 1976 legislated the termination of the ICC to be effective on September 30, 1978. Toward this end, Congress expressly provided for the transition of pending claims from the ICC to the Court of Claims, and in doing so showed no intent to retain the discharge provision of Section 22. (App. 55a-64a). At that time, Congress amended § 23 of the ICCA as follows:

> Sec. 23. The existence of the Commission shall terminate at the end of fiscal year 1978 on September 30, 1978, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. . . . ***Jurisdiction is hereby conferred upon the Court of Claims to adjudicate all such cases under the provisions of section 2 of the Indian Claims Commission Act:*** Provided, that section 2 of said Act shall not apply to any cases filed originally in the Court of Claims under section 1505 of title 28, United States Code. Upon dissolution of the Commission, all

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[15] The Court of Appeals in this case held that ICCA §22 was jurisdictional, in that it limited the Government's waiver of sovereign immunity. (App. 16a). The doctrines of res judicata and collateral estoppel, in contrast, are not jurisdictional; it is the defendant's burden under these doctrines to establish preclusion, and reasonable doubts are to be resolved in favor of the plaintiff. *Braniff Airways, Inc. v. Memphis-Shelby County Airport Authority*, 783 F.2d 1283, 1289 (5th Cir. 1986); *Kauffman v. Moss*, 420 F.2d 1270, 1274 (3d Cir. 1970).

> pending cases including those on appeal shall be transferred to the Court of Claims for adjudication on the same basis as those authorized to be transferred by this section.

P.L. 94-465, 90 Stat. 1990. (App. 55a-56a). (emphasis supplied).

While the ICCA's jurisdictional provision, section 2, was retained for the Court of Claims, other provisions of the ICCA were not. In this regard, Congress made an apparent decision that various provisions of the ICCA were moot and had no application once the ICC had been dissolved and remaining claims were transferred to the Court of Claims. For example, those provisions relating to Commission proceedings and rules were withdrawn and omitted. *E.g.*, 28 U.S.C. § 70c (staff and oath of commission); § 70f (time of commission meetings); § 70g (record of proceedings); § 70h (rules of procedure); § 70p (hearings). (*See* App. 58a-64a, historical and statutory notes to omitted 25 U.S.C. §§ 70 *et seq.*). Among these terminated provisions was the discharge provision, ICCA § 22, 25 U.S.C. § 70u (1976).

It should therefore be inferred that by transferring jurisdiction of the remaining ICC proceedings to the Court of Claims and omitting Section 22, among other mooted provisions, Congress intended to subject these proceedings to the same legal rules and doctrines—including those of res judicata and collateral estoppel—applicable in litigation generally in the Court of Claims. In other words, Congress determined that discharge by report to Congress and payment under Section 22 was part and parcel of the ICCA, and was no longer necessary or appropriate once the ICC had been terminated and proceedings were conducted by the Court of Claims in accordance

with its own rules and established principles of law. As to the ICC judgment in the Western Shoshone proceeding, the Court of Claims certified the award for payment on December 6, 1979, well after the September 30, 1978 termination date of the ICC, and apparently no report was ever made to Congress as required under § 22(a). *See United States v. Dann*, 470 U.S. 39, 105 S. Ct. 1058, 1061 (1985) (date award certified for payment); App. 74a, ¶ 45 (alleging that no report to Congress was ever made on the ICC judgment as required by ICCA § 22). The proceedings in the Court of Claims after September, 1978 in the Western Shoshone case are consistent with the inapplicability and nonexistence of ICCA § 22. As a result, the discharge bar of ICC § 22, 25 U.S.C. § 70u (1976), should not be applied to the claims made under the Treaty of Ruby Valley in this case.

The Court of Appeals in this case did not address the question of whether ICCA § 22 was in effect after September 30, 1978, when the proceeding continued in the Court of Claims. The Court of Federal Claims, in deciding that ICCA § 22 was in effect at the relevant time, held that "[i]n terminating the ICC, Congress modified two provisions; it did not repeal any. Pub.L. 94-465, 90 Stat. 1990. Instead, the ICCA has been omitted from the U.S. Code after the termination of the ICC." (App. 36a). However, if Congress had intended that not just Section 2 of the ICCA, which is expressly mentioned, but other provisions applicable to proceedings in the ICC carried over to proceedings in the Court of Claims, it could have easily stated so. (*See* App. 55a-57a, P.L. 94-465, 90 Stat. 1990). It did not. *Cf. Custis v. United States*, 511 U.S. 485, 492 (1994) (omission of language in statute indicative of Congress's intent).

The Court of Federal Claims also relied on *United States v. Dann*, 470 U.S. 39 (1985), which decided the narrow question of when "payment" occurs under ICCA § 22(a). 470 U.S. at 40-41. It held that the appropriation of funds into a Treasury account constituted "payment" under § 22(a). *Id.* The Court in *Dann*, however, did *not* consider the issue of whether § 22 was applicable to a "payment" made after the effective date of the termination of the ICC on September 30, 1978.[16]

Accordingly, the question of whether the broad statutory bar of ICCA §22, 25 U.S.C. §70u (1976), was effective at the relevant time, after proceedings were transferred to the Court of Claims and the ICC dissolved, is one of great importance to the Western Shoshone that has not been, but should be, settled by this Court.

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[16] The issue of whether ICCA §22 was effective at the time of "payment" was apparently not argued in the Supreme Court, and not considered by the Court. The Court of Appeals in this case also cites to *United States v. Dann*, 873 F.2d 1189, 1200 (9th Cir. 1989), and *Western Shoshone National Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991), as applying the bar of §22 to claims made under the Treaty of Ruby Valley. As in the case of the Supreme Court's Opinion in *Dann*, however, the issue of whether the ICC judgment triggered § 22—given that payment was not made until after the termination of the ICC and no report to Congress was made as required by § 22—was not addressed and not considered. It is a question of first impression raised in this case.

CONCLUSION

Petitioners, the South Fork Band *et al.* respectfully request that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2007-5020

WESTERN SHOSHONE NATIONAL COUNCIL and TIMBISHA SHOSHONE TRIBE,
Plaintiffs-Appellants,

and

SOUTH FORK BAND, WINNEMUCCA INDIAN COLONY, DANN BAND, BATTLE MOUNTAIN BAND, ELKO BAND and TE-MOAK TRIBE OF WESTERN SHOSHONE INDIANS,
Plaintiffs-Appellants,

v.

UNITED STATES,
Defendant-Appellee.

Appeal from the United States Court of Federal Claims in case no. 05-CV-558, Senior Judge Loren A. Smith.

DECIDED: May 22, 2008

Before RADER, SCHALL, and PROST, *Circuit Judges*.

RADER, *Circuit Judge*.

The Western Shoshone seek to invalidate a 1977 Indian Claims Commission (ICC) judgment awarding compensation for the taking of the Western Sho-

shone's aboriginal lands in Idaho, Utah, Nevada, and California. The Western Shoshone also seek additional compensation and other relief under the Treaty of Ruby Valley of 1863. The United States Court of Federal Claims granted the United States' motion to dismiss the Western Shoshone's action for lack of subject matter jurisdiction and for failure to state a claim. Because the Appellants filed their challenge twenty-four years after the Court of Claims affirmed the ICC's judgment, and because legislation specifically precludes the Appellants' current challenge, this court *affirms*.

I

The Western Shoshone include numerous tribes or bands of Native American Indians. For all of modern history, the Western Shoshone have occupied land in parts of what are now Idaho, Utah, Nevada, and California. Before the westward expansion of the United States, the Western Shoshone lived in extended family groups, or bands, and congregated together for ceremonies and food gathering. Today, the Western Shoshone live in various communities or colonies on the same land.

During the Civil War, the Union sought the natural resources of the West and entered into a series of treaties with the Indians to ensure access to those resources. Between July and October of 1863, the Union negotiated five treaties with various groups of Shoshone Indians, including the Treaty of Ruby Valley (Treaty) with the Western Shoshone, U.S.-W. Shoshone, Oct. 1, 1863, 18 Stat. 689. *See Nw. Bands of Shoshone Indians v. United States*, 324 U.S. 335, 340-42 (1945). Article 4 of the Treaty provided that "the Shoshone[] country may be explored and prospected for gold and silver, or other minerals; and

when mines are discovered, they may be worked, and mining and agricultural settlements formed . . . ." Article 5 defined the boundaries of "the country claimed and occupied by" the Western Shoshone. Article 6 provided that the President had discretion to force the Western Shoshone to move to reservations within the territory defined by Article 5. And Article 7 provided that the United States would compensate the Western Shoshone $5,000 per year for twenty years for agreeing to the Treaty's terms.

In 1946, Congress enacted the Indian Claims Commission Act (ICCA), codified as amended at 25 U.S.C. § 70 et. seq. (1976 ed.), to settle the Indian tribes' historical claims against the United States for the taking of land and related actions. In sum, the ICCA undertook to "dispose of the Indian claims problem with finality." *United States v. Dann*, 470 U.S. 39, 45 (1985) (quoting H.R. Rep. No. 79-1466, at 10 (1945)). The ICCA gave the ICC exclusive jurisdiction to hear claims brought within five years of the passage of the Act. Section 12 of the ICCA provided:

> The Commission shall receive claims for a period of five years after the date of the approval of this Act and no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration, nor will such claim thereafter be entertained by the Congress.

25 U.S.C. § 70k (1976). As a result, Indian claims existing on August 13, 1946 had to be filed by August 13, 1951 or be barred forever. *See United States v. Lower Sioux Indian Cmty.*, 519 F.2d 1378, 1383 (Ct. Cl. 1975); *see also Navajo Tribe of Indians v. United States*, 601 F.2d 536, 538 (Ct. Cl. 1979) ("The

applicable statute of limitations in the [ICCA] is a jurisdictional limitation upon the authority of the Commission to consider claims.").

In 1951, various Shoshone tribes, including the Appellant Te-Moak Band of the Western Shoshone, filed a joint petition with the ICC for the alleged taking of over 80 million acres of land, including the territory described in the Treaty of Ruby Valley. *Shoshone Nation v. United States*, 11 Ind. Cl. Comm. 387, 397, 419 (1962); *see also Dann*, 470 U.S. at 41-42. The petitioners also sought an accounting. *See Te-Moak Bands of W. Shoshone Indians v. United States*, 18 Cl. Ct. 82, 83 (1989).

The ICC "found that the Western Shoshones were separate from the other Shoshones and that the Te-Moak Bands were representative of the Western Shoshones." *Te-Moak*, 18 Cl. Ct. at 84 (citations omitted). As a result, the ICC "required the Te-Moak Bands to file a separate amended petition on behalf of the Western Shoshones." *Id.*

In 1962, the ICC found that the United States had effectively taken the Western Shoshone lands by allowing settlers and other non-native Americans to encroach upon the lands; the parties later stipulated that the Western Shoshone's aboriginal title was extinguished on July 1, 1872. *Shoshone Nation*, 11 Ind. Cl. Comm. at 416; *see also TeMoak Band of W. Shoshone Indians v. United States*, 593 F.2d 994, 996 (Ct. Cl. 1979). In 1972, the ICC determined the value of taken Western Shoshone property to be $26,145,189.89, including $4,604,00.00 for minerals extracted from the land in Nevada before the date of the taking. *See Te-Moak Band*, 593 F.2d at 996.

In 1974, a group of Western Shoshone Indians called the Western Shoshone Legal Defense and Education Fund Association (Association) attempted to intervene in the ICC proceedings. The Association, which the federal government did not formally recognize, contended that its lands were never taken, and that the Te-Moak Bands and the United States had colluded to treat the title as extinguished. The Association attempted to repudiate all sums that the Commission awarded to the Western Shoshone. Instead the Association contended that its constituents still held legal title to the property. The ICC dismissed the intervention as untimely. The United States Court of Claims affirmed the decision. *W. Shoshone Legal Def. & Educ. Ass'n v. United States*, 35 Ind. Cl. Comm. 457 (1975), *aff'd*, 531 F.2d 495 (Ct. Cl.), *cert. denied*, 429 U.S. 885 (1976).

In 1977, the Appellant Te-Moak Band attempted to change its position, asserting that it still held title to the claimed land on behalf of the Western Shoshone. *See Te-Moak Band*, 593 F.2d at 996. The Te-Moak Band also retained new counsel and moved for a stay of the proceedings. *Id.* at 997. The ICC denied the motion to stay and entered a final judgment awarding the Western Shoshone $26,145,189.89. *Te-Moak Bands of W. Shoshone Indians ex rel. W. Shoshone Nation v. United States*, 40 Ind. Cl. Comm. 318 (1977), *aff'd*, 593 F.2d 994 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979). In 1979, the Court of Claims affirmed the award. *Te-Moak Band*, 593 F.2d 994. The Clerk of the Court of Claims certified the award to the General Accounting Office, which deposited the amount of the award into an interest-bearing trust account? for the Western Shoshone on December 6, 1979. *Dann*, 470 U.S. at 42.

In 1987, the Appellant Timbisha Shoshone Tribe and two other Western Shoshone tribes sought to intervene with the accounting claims. This action asserted that the United States owed the Western Shoshone all revenues generated by the land until at least 1979. *Te-Moak Bands*, 18 Cl. Ct. at 83-85. Furthermore, the intervenors sought a general accounting for the United States' alleged misuse of revenues from the land, which had been held in trust by the United States. *Id.* at 84-85. The Court of Claims denied the motion to intervene as untimely. *Id.* at 89.

In 2004, Congress passed and the President signed into law provisions for the distribution of the ICC award from the trust account. Western Shoshone Claims Distribution Act, Pub. L. No. 108-270, 118 Stat. 805 (2004). The Act provides "for the use and distribution of the funds awarded to the Western Shoshone," and authorizes the Secretary of the Interior to promulgate implementing regulations. *Id.* § 5. In 2007, the Secretary issued regulations that establish an enrollment process to allow individuals to apply for a share of the Western Shoshone award in the trust account. 72 Fed. Reg. 9,836 (Mar. 5, 2007).

The Appellants include two groups of Western Shoshone tribes and bands. The first group includes the South Fork Band, Winnemuca Indian Colony, Dann Band, Battle Mountain Band, Elko Band, and Te-Moak Tribe of Western Shoshone Indians (South Fork Band). The second group includes the Western Shoshone National Council and Timbisha Shoshone Tribe (National Council).

The Appellants originally filed their action in the U.S. District Court for the District of Columbia in 2003. The district court granted the United States'

motion to transfer all but one of the claims to the Court of Federal Claims.[1] *W. Shoshone Nat'l Council v. United States*, 357 F. Supp. 2d 172 (D.D.C. 2004). The plaintiffs filed a Second Amended Complaint (Complaint) with the Court of Federal Claims that alleged five claims. Count I seeks declaratory relief that the judgment of the ICC is void under Rule of the Court of Federal Claims (RCFC) 60(b)(4). As an alternative to Count I, Count II alleges that the Western Shoshone are entitled to pre-judgment interest on the ICC's award. Count III seeks royalties on minerals mined and extracted under the Treaty of Ruby Valley. Count IV seeks an accounting of the proceeds from the United States' use of the land. And Count V seeks damages for breach of fiduciary duties arising from the alleged mismanagement of the land and for failure to act in accordance with the rights and duties allegedly created under the Treaty of Ruby Valley.

The Court of Federal Claims dismissed the claims under RCFC 12(b)(1) and 12(b)(6). *W. Shoshone Nat'l Council v. United States*, 73 Fed. Cl. 59 (2006). The court held that Count I was untimely as a motion under RCFC 60(b)(4) or as an independent action. The court also held that Count I failed to state a claim under RCFC 60(b) because in prior litigation federal courts had considered and rejected the Appellants' contentions. The court dismissed Count II

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[1] The district court transferred the remaining claim for quiet title to the U.S. District Court for the District of Nevada, which subsequently denied the claim. *W. Shoshone Nat'l Counsel v. United States*, 415 F. Supp. 2d 1201, 1207 (D. Nev. 2006). The National Council and South Fork Band are appealing that decision to the Ninth Circuit. *See W. Shoshone*, Nos. 06-16252 and 06-16214 (9th Cir.) (consolidated).

for lack of subject matter jurisdiction and for failure to state a claim, finding that the ICC judgment addressed all of the Shoshone aboriginal title claims and that the Treaty of Ruby Valley did not recognize fee title. The court dismissed Count III for lack of jurisdiction, finding that the claim was within the exclusive jurisdiction of the ICC and barred by the finality provision of the ICCA, which it determined had not been repealed when the ICC was terminated in 1978. The court also dismissed Count IV for lack of subject matter jurisdiction, because it found that the Government's liability had not been established. Finally, the court dismissed Count V as untimely under the six-year statute of limitations provided by 28 U.S.C. § 2501.

The South Fork Band and National Council filed separate notices of appeal, both of which were timely under Fed. R. App. P. 4(a)(1)(B). This court has jurisdiction under 28 U.S.C. § 1295(a)(3).

II

This court reviews de novo the Court of Federal Claims' dismissal of a complain for lack of jurisdiction under RCFC 12(b)(1) or for failure to state a claim under RCFC 12(b)(6). *Samish Indian Nation v. United States*, 419 F.3d 1355, 1363 (Fed. Cir. 2005) *Boise Cascade Corp. v. United States*, 296 F.3d 1339, 1343 (Fed. Cir. 2002). Like the trial court, in considering a motion to dismiss, this court accepts as true all well-pleaded allegations of fact, construed in the light most favorable to the nonmoving party. *Bradley v. Chiron Corp.*, 136 F.3d 1317, 1321-22 (Fed. Cir. 1998). This court also reviews without deference the trial court's statutory interpretation. *W. Co. of N. Am. v. United States*, 323 F.3d 1024, 1029 (Fed. Cir. 2003).

In Count I of their Complaint, the Western Shoshone seek to set aside the ICC's judgment under RCFC 60(b) because the ICC allegedly denied them due process in reaching its judgment. The Appellants allege that the Bureau of Indian Affairs refused to accept a notice of discharge of the Te-Moak Band's counsel, after the counsel—contrary to the Te-Moak Band's new instructions—continued to pursue a claim that the Western Shoshone's land had been taken and their aboriginal title extinguished.

RCFC 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (4) the judgment is void . . . . The motion shall be made within a reasonable time . . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment . . . .

R. Ct. Fed. Cl. (60)(b) (2007).

The Western Shoshone advance two theories to try to set aside the ICC's judgment. They argue that the judgment is void under RCFC 60(b)(4), or that Count I is an "independent action" which should relieve them from judgment.

In 1977, twenty-six years after filing a petition with the ICC and five years after the ICC determined the value of their property, the Te-Moak Band sought to change counsel and its position on the question of the taking of tribal land. The ICC considered but denied the Te-Moak Band's motion to stay the proceedings for this purpose. Instead the ICC entered final judgment. The Court of Claims affirmed the

ICC's judgment in 1979. Twenty-four years passed before the Western Shoshone filed this complaint in 2003.

Twenty-four years is not a reasonable time to have waited to challenge the Court of Claims' affirmance. Confronted with a much shorter delay, this court's predecessor, the United States Court of Claims denied a similar procedural challenge in *Pueblo of Santo Domingo v. United States*, 647 F.2d 1087 (Ct. Cl. 1981). In *Pueblo of Santo Domingo*, an Indian tribe sought to withdraw from a 1969 stipulation because the tribe's counsel had allegedly acted contrary to the tribe's instructions. In 1973, the ICC entered judgment with respect to the taken Indian property, and the Court of Claims affirmed the judgment on appeal in 1975. The tribe sought again to withdraw from the stipulation in 1980. *Id.* at 1088. The Court of Claims found that Ct. Cl. Rule 152(b) governed the tribe's motion to set aside the stipulation as void. *Id.* at 1089.

The predecessor to RCFC 60(b), Ct. Cl. Rule 152(b) "commands that the motion shall be made within a 'reasonable time.'" *Id.* (citing *Andrade v. United States*, 485 F.2d 660, 664 (Ct. Cl. 1973)). The Court of Claims enforced the timeliness requirement strictly because "Congress has expressed its desire that the special Indian claims litigation be wound up by having terminated the operations of the ICC in 1978." *Id.* As a result, the court held that the tribe's attempt "to withdraw from a stipulation entered nearly twelve years ago falls egregiously outside the permissible range of delay." *Id.*

This court has adopted as its own law the decisions of the Court of Claims. *See Coltec Indus. v. United States*, 454 F.3d 1340, 1344 (Fed. Cir. 2006). In view

of *Pueblo of Santo Domingo* and the Appellants' twenty-four year delay, the "reasonable time" requirement of RCFC 60(b) bars the Appellants' tardy challenge under RCFC 60(b)(4). This court detects nothing in the record or arguments in this case that compel departure from the rule and guidance in *Pueblo of Santo Domingo*.

The National Council argues that an "independent action" like Count I is not subject to the timeliness requirement of RCFC 60(b). Even construing Count I as an independent action (which this court does not accept), this claim would still confront a problem with the statute of limitations in 28 U.S.C. § 2501. Section 2501 provides: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2006). Count I challenges alleged procedural defects in ICC proceedings before the Court of Claims' affirmance in 1979. Thus, the National Council's claim first accrued well outside the six-year statute of limitations of § 2501.

The National Council suggests that the claim did not accrue because the ICC did not submit a final report of its judgment to Congress. The National Council purports to have only recently discovered this fact. These allegations, however, do not alter the accrual date for this claim. The United States Court of Claims affirmed the Western Shoshone judgment in 1979. The Western Shoshone Distribution Act authorized distribution of the General Accounting Office trust account according to the ICC judgment. Thus, the Court of Claims, the United States Congress, and the General Accounting Office have treated the ICC judgment as final for decades. None

of these institutions or their actions depended on submission of a final report from ICC. Further, as the Court of Claims pointed out, a 1978 ICC Final Report (and a 1990 book that reproduced a chart from that final ICC report) fully disclose that the ICC did not intend to issue a report to Congress reiterating that the Western Shoshone case was complete. The absence of a final report should have been apparent for decades. *See Fallini v. United States*, 56 F.3d 1378, 1380 (Fed. Cir. 1995) ("The question whether the pertinent events have occurred is determined under an objective standard; a plaintiff does not have to possess actual knowledge of all the relevant facts in order for the cause of action to accrue." (citation omitted)).

Because this court finds that Count I is untimely either under RCFC 60(b)(4) or as an independent action, the Court of Federal Claims lacked subject matter jurisdiction over the claim. The trial court thus appropriately dismissed it under RCFC 12(b)(1). As a result, this court does not reach whether Count I fails to state a claim under RCFC 12(b)(6).

As an alternative to Count I, in Count II the Western Shoshone seek to recover $14 billion as prejudgment interest on the ICC's award from the stipulated date of the taking, 1872, until the date of the award. The Appellants do not challenge on appeal the Court of Federal Claims' finding that the ICC judgment fully compensated the Western Shoshone for extinguishing their aboriginal title. The Appellants argue they are entitled to interest based on treaty title.

Aboriginal title is the right to exclusive possession that Indian tribes hold as the occupants of the land when the United States arrived. Treaty title is the

equivalent of fee title that the United States has acquired by treaty. A taking of property held under treaty title requires compensation under the Fifth Amendment, including interest. *See Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448 (W.D.N.Y. 2002) (discussing the distinction between aboriginal and treaty title); *Three Affiliated Tribes of Ft. Berthold Reservation v. United States*, 390 F.2d 686, 690 (Ct. Cl. 1968) ("Interest from the time of taking is automatically included in order to satisfy the demands of the Fifth Amendment." (citations omitted)).

Thus, this court must inquire whether the Treaty of Ruby Valley recognized that the Western Shoshone held fee title. The United States Supreme Court has addressed that question and determined that the Treaty did not recognize such title. Instead of acknowledging "any exclusive use and occupancy right or title of the Indians," the Treaty was "a treaty of peace and amity with stipulated annuities for the purposes of accomplishing those objects and achieving that end." *Nw. Bands*, 324 U.S. at 346. As the United States Court of Appeals for the Ninth Circuit recognized, the Treaty "acknowledged the territories claimed by the Shoshones without 'recognizing' title so as to establish a property interest compensable under the Fifth Amendment." *United States v. Dann*, 873 F.2d 1189, 1200 n.8 (9th Cir. 1989) (citing *Nw. Bands*, 324 U.S. at 348).

Appellants argue that the Supreme Court in *Northwestern Bands* interpreted only the Box Elder Treaty, not the Treaty of Ruby Valley. Appellants seek to distinguish those two treaties because the former included an amendment that expressly stated that treaty title was not conveyed, while the latter treaty did not. To the contrary, the Supreme Court's

reasoning and conclusions cover the Treaty of Ruby Valley. In *Northwestern Bands*, the Supreme Court discussed all of the treaties in which the Union entered with the Shoshone Indians in 1863 that were "similar in form." 324 U.S. at 343. The Court specifically referenced the Western Shoshone treaty and stated that "nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy." *Id.* at 348. The Supreme Court read the amendment to the Box Elder Treaty, but it did not find that the amendment's absence from the Treaty of Ruby Valley implied that the Union intended to convey title.

Moreover, this court does not find any language in the Treaty of Ruby Valley that suggests that the Union intended to convey title to the Western Shoshone. As Article 6 of the Treaty reflects, the Union merely permitted the Western Shoshone to continue occupying the lands defined by Article 5. Permissive occupation does not imply a grant of title. *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79 (1955) (finding that for the Government to convey rights "there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation").

Further, the United States' actions after adopting the Treaty are inconsistent with an interpretation that the Treaty of Ruby Valley conveyed title. Rather, the United States' actions confirm that it considered the territory covered by the Treaty to be in the public domain. "School lands were granted. National forests were freely created. The lands were opened to public settlement under the homestead laws . . . ." *Nw. Bands*, 324 U.S. at 346 (citations omitted). The United States administered the territory "as though

no Indian land titles were involved." *Id.*; *see also Te-Moak Bands*, 18 Cl. Ct. at 83.

Because the Treaty of Ruby Valley did not recognize that the Western Shoshone held fee title in the disputed territory, this court agrees with the Court of Federal Claims that Count II fails to state a claim under RCFC 12(b)(6).

In Count III, the Western Shoshone seek royalties on minerals mined and extracted under the Treaty of Ruby Valley. The Government argues in part that the finality provision of the ICCA bars the Appellants' claim for royalties. The South Fork Band responds that ICCA does not bar Count III because the Treaty of Ruby Valley is ambiguous with respect to the payment of royalties after 1882, and that Count III seeks royalties that accrued after 1946.

The finality provision of the ICCA provides: "A final determination against a claimant made and reported in accordance with the Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy." 25 U.S.C. § 70u(b) (1976) (omitted 1978). The ICC found that the Western Shoshone's aboriginal title had been extinguished in 1872 and awarded the Western Shoshone $26,145,189.89 for all claims arising out of territory described in the Treaty of Ruby Valley and to which they claimed aboriginal title.

The Court of Claims affirmed the ICC determination. The award included $4,604,600 for minerals extracted from the land in Nevada before the taking. Thus, the ICC conclusively resolved the Western Shoshone's claim for royalties. *Cf. Dann*, 873 F.2d at 1200 (finding on remand from the Supreme

Court that the ICC's judgment with respect to the Treaty of Ruby Valley and the Western Shoshone's interest in the territory described in it barred the Danns from "asserting the tribal title to grazing rights just as clearly as it bars their asserting title to the lands"); *W. Shoshone Nat'l Council v. Molini*, 951 F.2d 200, 203 (9th Cir. 1991) ("The Commission's general finding that title had been extinguished therefore also operates to bar the Shoshone from asserting hunting and fishing rights based on the Treaty of Ruby Valley." (citation omitted)). Because the finality provision of the ICCA limits the Government's waiver of sovereign immunity, and because that provision bars Count III, the Court of Claims correctly dismissed the claim for lack of subject matter jurisdiction under RCFC 12(b)(1).

Counts IV and V fail for the same reason. Count IV seeks an accounting of the proceeds from the Government's use of the land described in the Treaty of Ruby Valley. Count V seeks damages for the Government's alleged breach of fiduciary duty arising from the alleged mismanagement of the land described in the Treaty and for failure to act in accordance with the rights and duties allegedly created under the Treaty. Assuming that the Treaty imposed a fiduciary duty on the Government, the finality provision of the ICCA and the Court of Claims' affirmance of the ICC's final determination with respect to the Western Shoshone's aboriginal rights to the territory extinguished any claim for an accounting or breach of fiduciary duty with respect to that territory or such revenue. Indeed, the Te-Moak Bands included a claim for an accounting in their original petition to the ICC. The ICC considered that claim in reaching its final determination, and, as discussed above, in 1987 the Court of Claims dis-

missed as untimely a motion by the Appellant Timbisha Shoshone Tribe and two other Western Shoshone tribes to intervene to pursue accounting claims allegedly arising after the 1946 cutoff date prescribed by the ICCA. *See Te-Moak Bands of W. Shoshone*, 18 Cl. Ct. at 83-85, 89.

This court therefore affirms the Court of Federal Claims' dismissal of the Appellants' claims under RCFC 12(b)(1) and 12(b)(6).

AFFIRMED

COSTS

Each party shall bear its own costs.

APPENDIX B

FOR PUBLICATION
IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed: September 20, 2006]

Case No. 05-558L

WESTERN SHOSHONE NATIONAL COUNCIL, *et al.*

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Motion to Dismiss, RCFC 12(b)(1); RCFC 12(b)(6); RCFC 60(b), 60(b)(4); Indian Claims Commission Act (ICCA); Finality Provisions; 25 U.S.C. § 70u (1976) 25 U.S.C. § 70k (1976); ICCA § 22; Aboriginal Title; Treaty of Ruby Valley; 28 U.S. C. § 2501 (2000)

OPINION

SMITH, *Senior Judge*:

This is the latest litigation involving a claim to approximately 60 million acres that goes back more than fifty years. This action challenges proceedings before the Indian Claims Commission (ICC) and the Court of Claims. The Court has before it Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint under Rules of the Court of Federal Claims (RCFC) 12(b)(1) and 12(b)(6). The Court held oral argument in Reno, Nevada on May 25, 2006 and in

Washington, DC on June 14, 2006. For the reasons set forth in this opinion, the Court hereby GRANTS Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint.

FACTS [1]

Since time immemorial, the Shoshone have occupied certain lands in what is now part of the United States. The Shoshone lived in extended family groups, or bands, and gathered together for ceremonial celebrations or food gathering activities. Today, they live in various communities in the same lands. Some of the bands of Shoshone are recognized by Congress under the Indian Reorganization Act, others are not.

During the United States' westward expansion, tensions arose between the United States and the western Indian tribes, including some of the Shoshone. When the Civil War began, the Union required additional resources, many of which were found in the West. The United States, seeking to avoid conflict with the Indians, entered into a series of treaties to ensure undisturbed passage to the resources of the West. These five treaties became known as the Doty Treaties after the Government's negotiator, Mr. James Doty. On October 1, 1863, the United States entered into a treaty with the "Western Shoshoni," which became known as the Treaty of Ruby Valley. 18 Stat. 689, Ratified June 26, 1866, Proclaimed Oct. 21, 1869.

In 1946, Congress sought to provide a means for Indian Tribes to bring historical claims against the

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[1] The facts are compiled from the Parties' briefs and prior litigation in this and related cases.

United States for the taking of land and other related actions. To achieve that goal, Congress passed the Indian Claims Commission Act (ICCA). The ICCA created the Indian Claims Commission (ICC) and provided that Indian tribes could bring claims before the ICC for taken lands and had jurisdiction to hear cases filed within five years of the passage of the ICCA. The limitation provision made clear that "no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration." 25 U.S.C. § 70k (1976). Effectively, all claims existing on August 13, 1946 had to be filed by August 13, 1951 or be barred forever. *E.g. Lower Sioux*, 519 F.2d at 1383. This case is brought by Plaintiffs concerning their rights under the Treaty of Ruby Valley of 1863 and issues of validity and enforceability against the Plaintiffs of a judgment rendered in the Indian Claims Commission (ICC).

PROCEDURAL BACKGROUND

This case was originally filed in the United States District Court for the District of Columbia and was transferred to this Court on a Motion by Defendant.[2] After being transferred to this Court, the case was initially assigned to another Judge. Pursuant to this Court's rules, Defendant then filed a Notice of Directly Related Cases and the case was reassigned. Thereafter, Defendant filed its Motion to Dismiss Plaintiffs' Second Amended Complaint.[3] Both the

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[2] One portion of the Complaint, seeking to quiet title, was transferred to the District Court in Nevada. That Court has since denied Plaintiffs' claim.

[3] After Defendant filed its Motion to Dismiss, Plaintiffs filed a substitution of counsel with regard to two of the named Plaintiffs. Plaintiffs South Fork Band, Winnemuca Indian Colony,

South Fork Band and National Council filed opposition to Defendant's Motion, and Defendant replied. The Court then held oral argument over two days and now issues its opinion.

STANDARD OF REVIEW

RCFC 12(b)(1) provides for the dismissal of claims if the Court lacks jurisdiction over the subject matter of the claims. It is well settled that "a party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists," *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991) (citing *KVOS, Inc. v. Associated Press*, U.S. 269, 278 (1936)), and that "subject matter jurisdiction is strictly construed." *Leonardo v. United States*, 55 Fed. Cl. 344, 346 (2003).

RCFC 12(b)(6) authorizes a court to dismiss a claim for failure to state a claim upon which relief can be granted. Claims must be dismissed if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his legal claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 102 (1957).

Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain and Elko Band (collectively "South Fork Band") retained prior counsel. Plaintiffs Western Shoshone National Council and Timbisha Shoshone Tribe (collectively "National Council") retained new counsel. When referring to all of the Plaintiffs together, the Court will refer to "Plaintiffs." If, however, the Court is referring to one of the groups of Plaintiffs, it will refer to either "South Fork Band" or "National Council." When referring to Western Shoshone generally, the Court will refer to "Shoshone" or "Western Shoshone."

THE SECOND AMENDED COMPLAINT

I. Count I

In Count I, Plaintiffs seek either a declaratory judgment that the ICC Judgment is not enforceable against them, or that the ICC Judgment is void under RCFC 60(b) because of alleged due process violations. Defendant argues that the Court should dismiss Count I under RCFC 12(b)(1) and 12(b)(6) because they are out of time and they fail to state a claim. The South Fork Band responds that they are entitled to relief under RCFC 60(b)(4) because they were denied due process before the ICC and there is no time limit for RCFC 60(b)(4). The National Council takes a somewhat different approach, although they incorporate all of South Fork Band's arguments. The National Council argues that the "sham" proceeding before the ICC denied them of due process and that they are, therefore, entitled to relief from it and all cases that rely on it, including those handed down by the Supreme Court of the United States. The National Council alleges that they have new evidence that no court has ever examined in the long history of this case. Further, they argue that they are not bringing a motion under RCFC 60(b), but rather an independent action allowed under the rule.

A. Finality Provision of the ICCA

The Supreme Court and the Court of Claims have both made clear that the paramount purpose of the ICCA was to determine meritorious Indian claims with finality. *E.g. United States v. Dann*, 470 U.S. 39, 44-45 (1985) (quoting H.R. Rep. No 1466, 79th Cong., 1st Sess., 10 (1945)).[4] Defendant argues that the

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[4] National Council requests this Court set aside the *Dann* decision. National Council Br. at 7. It is clear, as stated above,

finality provision of the ICCA bars the current action. Section 22(a) of the ICCA states that "[t]he payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy." 25 U.S.C. § 70u(a) (1976) (omitted after the dissolution of the ICC). The Government argues that, given Congress's intent to draw all historic Indian claims to a close, the Court should apply § 22(a) to this count because it attempts to re-litigate long-settled issues. The Court certainly agrees that Congress has long desired to bring these claims to an end. However, it does not appear that Congress intended the finality provision to bar Rule 60 challenges to the ICC process. The Court of Claims allowed an independent action to proceed eight years after the payment of an ICC judgment. *Andrade v. United States*, 485 F.2d 660, 661 (Ct. Cl. 1973). Therefore, the Court cannot dismiss Count I under § 22(a). That does not, however, end the inquiry.

B. Timeliness of a Motion Under RCFC 60(b)

RCFC 60(b) sets forth the circumstances under which the Court may grant a party relief from a judgment or order that is not the result of clerical error. The text of RCFC 60(b) sets forth two distinct time limitations. As relevant here, a motion for relief based on "newly discovered evidence" must be filed "not more than one year after the judgment, order, or proceeding was entered or taken." RCFC 60(b). Fur-

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"[t]here can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims." *Coltec Indus., Inc.*, 454 F.3d at1353; *see also Strickland*, 423 F.3d at 1338 & n.3.

ther, with regard to *a* motion seeking relief from a void judgment under RCFC 60(b)(4), the rule states that it must be filed "within a reasonable time." *Id.* South Fork Band argues that there is no time limit on motions under RCFC 60(b)(4). They base their argument on cases from other circuits that have held that the passage of time cannot make a void judgment valid. The Defendant argues that none of those cases deal with a delay this long and that the reasonable time requirement bars Count I.

While other circuits may reject time limits for Fed. R. Civ. P. 60(b), the Court of Claims made plain that motions challenging ICC procedures filed under Ct. Cl. Rule 152(b) (now RCFC 60(b)) must be filed within a reasonable time. *E.g. Pueblo of Santo Domingo v. United States*, 647 F.2d 1087, 1089 (Ct. Cl. 1981). This determination is binding upon this Court. As the Federal Circuit made clear, "[t]here can be no question that the Court of Federal Claims is required to follow the precedent of the Supreme Court, our court, and our predecessor court, the Court of Claims." *Coltec Indus., Inc. v. United States*, 454 F.3d 1340, 1353 (Fed. Cir. 2006) (citation omitted); *see also Strickland v. United States*, 423 F.3d 1335, 1338 & n.3 (Fed. Cir. 2005). Therefore, to be timely, this motion must be filed within a reasonable time. In this case, the Court of Claims affirmed the ICC judgment in 1979. *Temoak Band of Western Shoshone Indians, Nev. v. United States*, 593 F.2d 994 (Ct. Cl. 1979). Further, it appears that all of the procedural defects alleged by the South Fork Band took place before that date. Assuming that this Court could base its reasonableness determination on the district court complaint filed in September 2003, Plaintiffs would have to show that the 24 year delay was reasonable. They have failed to do so.

C. Timeliness of an Independent Action Under RCFC 60(b)

Conceding the one year limitation imposed on motions introducing newly discovered evidence under RCFC 60(b)(1), the National Council frames its claim as an independent action. The Court of Claims made clear that the timeliness of an independent action contemplated under the rule is governed by the statute of limitations and lathes. *Andrade v. United States*, 485 F.2d 660, 664 (Ct. Cl. 1973) (per curiam). As in all cases before this Court, 28 U.S.C. § 2501 imposes a six year statute of limitations. The *Andrade* Court held that the unexplained delay of eight years made the independent action untimely and dismissed that case. In this case Defendant argues that the facts the National Council claim are newly discovered were, in fact, clearly available and known to the Ninth Circuit and Supreme Court in *Dann*.

The National Council's attorneys have been particularly unhelpful in deciding this issue.[5] In the National Council's brief, they assert as "newly discovered" the fact that the ICC's Final Report listed twenty cases as "not report [sic] to Congress as completed." National Council Br. at 16. In support of this contention the National Council did not cite the ICC Final Report itself, but instead cited a book, published in 1990, which merely reproduced a chart from the ICC Final Report. *Id.* at 16 n.32 (citing H.D. Rosenthal, Their Day in Court: A History of the Indian Claims Commission 26667 (1990)). The National Council never explains how this fact, which is clearly stated in the ICC Final Report published in

[5] The Court wants to make clear that it in no way directs this criticism toward the counsel for the South Fork Band.

1978, and Mr. Rosenthal's book published in 1990, could be newly discovered after 2000. All one had to do was open the report, an official publication of the United States Government, to see the footnote that the National Council raises in its brief. ICC Final Report, p. 125; National Council Br. at 16.

Oral argument only made Plaintiffs' position appear more unreasonable. As noted above, the National Council Brief raised the issue of the footnote to the ICC Final Report. The following exchange took place during oral argument:

> MR. HAGER: It's been less than six years since they found out there was no final report. That's what I'm saying.
>
> THE COURT: But that's not what your materials say. Your materials say 1990 is your source for finding that there was no report. And that's, by my count, 15 years from the time the case was filed.
>
> MR. HAGER: I didn't say 1990.
>
> THE COURT: No?
>
> MR. HAGER: No. I said within the last two or three years is when Steve Newcombe from the Indigenous Rights Institute learned that there was no final report.
>
> THE COURT: But the source of that is a cite from a 1990 book, which may not have been in his library, but still was public record. And he's citing, from looking at the 1990 book, he's citing the 1979 report. So in 1979 it was public information.

Wash. Tr. at 39.[6] The National Council then made things worse by arguing that *United States v. Beg-*

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[6] The Court will refer to the "Reno Tr." and "Wash. Tr." to differentiate between the two court sessions.

gerly, 524 U.S. 38 (1997), supported its position that this Court could reopen this case. Wash. Tr. at 35-36. While presenting an accurate account of what the circuit court did in *Beggerly*, nowhere did the National Council's attorney mention that the Supreme Court reversed the circuit court's decision. *Beggerly*, 524 U.S. at 49. This type of oral argument does a disservice to both the Court and the client.

In the end, the issue of whether this alleged defect in the ICC Final Report is newly discovered is not difficult. Newly discovered evidence is judged on an objective rather than subjective standard. Plaintiffs must show that they could not have discovered such evidence through due diligence prior to when they found it. The publication in an official publication of the United States, in 1978, is enough to put Plaintiffs on objective notice of this fact. Further, the republication of the same fact in a book documenting the history of the ICC in 1990 can only amplify the point that there was no newly discovered evidence. Thus, there is no basis to sustain an independent action 25 years after the fact. While the Court for the moment assumes this "newly discovered" evidence is actual evidence, reading it makes that highly unlikely. However, whether it has any objective credibility is not critical to the Government's motion.

Therefore, the Court finds that Plaintiffs' Count I is untimely as either a motion under RCFC 60(b)(4) or an independent action. Because the statute of limitations in this Court constitutes a waiver of sovereign immunity, the Court must dismiss Count I for lack of subject-matter jurisdiction. As the Court will demonstrate below, even if Count I were timely, Plaintiffs have failed to state a claim.

D. Merits of Plaintiffs' Claims and This Court's Authority Under RCFC 60(b)(4)

Even if the motion and independent action are timely, the Court finds that Plaintiffs have failed to state a claim under RCFC 60(b). In order to grant relief, the Court must find that a "grave miscarriage of justice" would result if relief is denied. *Beggerly*, 524 U.S. at 47. In this case, Plaintiffs claim that their due process rights were violated by the proceeding before the ICC. The National Council argues that Defendant violated its rights by designating who would represent the Shoshone, choosing their attorney, limiting the claims allowed, and entering unsupportable stipulations. National Council Br. at 7. The South Fork Band states more generally that the ICC failed to provide procedural safeguards. South Fork Band Br. at 30-31. However, these same allegations have been presented to courts in the past and rejected. For example, the designation of the representative was challenged, and upheld, by the Court of Claims. *Western Shoshone Legal Defense & Educ. Ass'n*, 531 F.2d at 503. Further, Plaintiffs claim that the Plaintiffs before the ICC were denied the right to fire their counsel. However, when they did so, the proposed new counsel appeared and argued before the Court of Claims. *Temoak Band*, 593 F.2d at 995. Additionally, the Supreme Court denied petitions for certiorari with respect to the cases that had been heard in the Court of Claims. *Western Shoshone Identifiable Group v. United States*, 444 U.S. 973 (1979); *Western Shoshone Legal Defense & Educ. Ass'n*, 429 U.S. 885 (1975). The extraordinary relief allowed under RCFC 60(b) does not provide a second chance to appeal. Plaintiffs have failed to present any evidence that would show a grave miscarriage of justice that has not already been considered by a various federal

courts. Therefore, even if Count I could be considered timely, Plaintiffs have failed to state a claim for which relief may be granted and the Court is compelled to dismiss it under RCFC 12(b)(6).

II. Count II

In Count II, Plaintiffs seek to recover interest for taking of the Plaintiffs' "fee title land." South Fork Band Br. at 15-16. The Government moves to dismiss Count II because there is no waiver of sovereign immunity for prejudgment interest for the taking of the disputed land. *See Library of Congress v. Shaw*, 478 U.S. 310, 315 (1986) (holding that the United States is immune from an award of interest absent an express waiver of immunity). Plaintiffs counter that Count II is argued in the alternative to Count I and is predicated upon the following two circumstances: "(1) the Court determines that the ICC Judgment is valid; and (2) the Court finds . . . that the ICC Judgment extinguished the [Plaintiffs'] 'independent treaty-based rights.'" *Id.* If Plaintiffs held Treaty Title to the disputed land, as opposed to aboriginal title,[7] then Plaintiffs claim they are entitled to interest because this would constitute a Fifth Amendment taking. The Court holds that it must dismiss this claim.

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[7] Aboriginal title is the right to exclusive possession that tribes hold as the result of occupying land from time immemorial. There is no waiver of sovereign immunity for the extinguishment of aboriginal title. Treaty title is the equivalent of fee title that is acquired through a treaty with the United States. Because it is the equivalent of fee title, the taking of property held under treaty title requires compensation under the Fifth Amendment, which includes interest. For an in depth examination of this distinction, *see Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448 (W.D.N.Y. 2002).

A. Aboriginal Title

Plaintiffs argue that the ICC did not deal with a significant portion of the Plaintiffs' land that they occupy under aboriginal title. The Plaintiffs claim that, at the least, the Treaty of Ruby Valley defined the area that the Plaintiffs occupy under aboriginal title. That area, described in Article V of the Treaty, amounts to approximately 60,000,000 acres of land. The ICC proceedings, according to Plaintiffs, only dealt with 24,000,000 acres. Reno Tr. 26-29; *See also Western Shoshone Identifiable Group v. United States*, 29 Ind. Cl. Comm. 5, 63 (1972) (finding aboriginal title to 22,211,753 acres in Nevada and 2,184,650 acres in California). Therefore, Plaintiffs claim that they still maintain aboriginal title to approximately 36,000,000 acres even if the ICC judgment was valid. South Fork Band Br. at 15 n.5. Defendant responds that Plaintiffs' reading of the ICC judgment is flawed. According to the Government, the ICC dealt with the entire area and found that the Shoshones only established aboriginal title to the 24,000,000 acres. In the alternative, Defendant argues that even if Plaintiffs are correct, that the time and place to bring their claim to the 36,000,000 acres was before the ICC.

Plaintiffs' arguments cannot withstand scrutiny. The ICC dealt with all of the Shoshone aboriginal title claims, not just the 24,000,000 acres for which it awarded damages. The ICC defined with specificity the area that was exclusively used and occupied by the Western Shoshone Identifiable Group (*i.e.* the 24,000,000 acres). *Western Shoshone*, 29 Ind. Cl. Comm. at 413-14. The Commission stated that:

> Lands within the claimed area which have been found not to have been exclusively used and oc-

> cupied by the four Shoshone land-using entities described herein include lands for which there is no substantial evidence of their respective exclusive use and occupancy and also lands used by various other tribes or groups of Indians.

Id. at 414. Further, Plaintiffs' claim to aboriginal title to the additional 36,000,000 acres cannot withstand the fact that the ICC determined that other tribes held such title to parts of that same land. As discussed above, aboriginal title requires that the claiming Indians must establish exclusive occupancy and use of the land, therefore, it is impossible for more than one tribe to hold aboriginal title to the same land. The ICC held that the Shoshone Tribe, which was distinct from the Western Shoshone, held aboriginal title to land extending from Twin Falls, Idaho "southwest to the Western Shoshone identifiable group's northeastern boundary line . . . ; thence southeast along said Western Shoshone boundary line . . . ; thence in a direct northeasterly line . . . ." *Id.* at 412. The Goshute Tribe held aboriginal title to lands from Wendover, Utah "due west to the Western Shoshone group's boundary line . . . ; thence south along the Western Shoshone boundary to Kimberly, Nevada; thence east . . . ." *Id.* at 413. Further, in other cases, the ICC determined that the Northern Paiute and the Indians of California held aboriginal title to other tracts within the 60,000,000 acres, including all of the land in California not established as Western Shoshone land in the ICC decision. *Indians of California v. United States*, 8 Ind. Cl. Comm. 1 (1959).

Therefore, the ICC dealt with aboriginal title to all 60,000,000 acres and determined that the Western Shoshone only established aboriginal title to approxi-

mately 24,000,000 acres. The parties then stipulated that the aboriginal title had been extinguished as of July 1, 1872. Under the ICC judgment, Plaintiffs no longer hold aboriginal title to any of the 60,000,000 acres and the claim must be dismissed for lack of subject-matter jurisdiction.

C. Treaty of Ruby Valley

Underlying much of the litigation presently before the Court is the Treaty of Ruby Valley and the proper interpretation of it. Plaintiffs argue that the Treaty grants them treaty title. The Government argues that the Treaty was merely one of friendship and that it conveyed no treaty rights to any of the lands described in it. Much of the briefing submitted on this topic involved the meaning of the Supreme Court's decision in *Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 355 (1945). Defendant argues that *Northwestern Bands* precludes the determination that Plaintiffs ever held treaty title to the land. Plaintiffs argue that *Northwestern Bands* did not rule upon an interpretation of the Treaty of Ruby Valley. Rather, Plaintiffs argue the Court reviewed a different treaty, the Box Elder Treaty. The Court finds this argument to be without merit. In *Northwestern Bands*, the Supreme Court discusses all of the treaties entered into with the Shoshones in 1863, which were "similar in form." 324 U.S. at 343. Further, the Court's conclusion that no recognized title had been conferred is stated in terms clearly applicable to the Treaty of Ruby Valley. *Id.* at 348. Following a discussion in which the Court specifically referenced the Western Shoshone treaty, the Court stated "nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy." *Id.*

South Fork Band also argue that recognized title may be reasonably inferred from the language used in the Treaty of Ruby Valley. South Fork Band Resp. Br. at 9. The Court disagrees. Even though there is no particular form necessary for congressional recognition of Indian right of permanent occupancy, "there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 27879 (1955)(citation omitted). And specifically, in *Northwestern Bands,* the Supreme Court stated that such definite intention was lacking in the language employed in the Treaty of Ruby Valley. 324 U.S. 348. It is clear to the Court that Plaintiffs cannot rely on the allegation that the Treaty of Ruby Valley recognized the Western Shoshones' ownership of land. Accordingly, the Court finds that the claim must be dismissed for Plaintiffs can not prove any set of facts in support of their claim that would entitle them to relief.

III. Count III

In Count III, Plaintiffs seek royalties for minerals mined from the disputed land under the Treaty of Ruby Valley. Defendant argues that this Count is barred by the statute of limitations and the finality provision of the ICCA. Defendant argues that because the ICC Judgment includes a $4,604,600 award for minerals removed from the land, § 22 bars this Count. *Temoak Band*, 593 F.2d at 996; 40 Ind. Cl. Comm. 318, 452 (1977). Plaintiffs[8] argue that the

[8] These arguments are the South Fork Band's. The National Council does not argue this issue specifically, but it does expressly incorporate all of the South Fork Band's arguments. National Council, Br. at 1. With this caveat, the Court will refer to "Plaintiffs" in this section.

finality provision cannot bar this case because it was repealed before the payment of the ICC judgment. Alternatively, they argue that it is not jurisdictional. They finally argue that the ICC procedure was not followed, therefore, the finality provision was never triggered in this case.

A. The Exclusive Jurisdiction of the ICC

Defendant argues that the ICC had exclusive jurisdiction over any claim seeking to recover royalties under the Treaty of Ruby Valley. The Court has already noted that when Congress passed the ICCA, it sought to bring all meritorious claims to conclusion. To that end, the ICC had jurisdiction to hear cases filed within five years of the passage of the ICCA. The limitation provision made clear that "no claim existing before such date but not presented within such period may thereafter be submitted to any court or administrative agency for consideration." 25 U.S.C. § 70k (1976). Effectively, all claims existing on August 13, 1946 had to be filed by August 13, 1951 or be barred forever. *E.g. Lower Sioux*, 519 F.2d at 1383. Further, the Indian Tucker Act grants the Court of Federal Claims jurisdiction over claims "accruing after August 13, 1946." 28 U.S.C. § 1505 (2000). Plaintiffs argue that this Count accrued after 1946, however, they do not explain that proposition. The Treaty, entered in 1863, expressly obligated the United States to pay the Western Shoshone $5,000 per year for twenty years. It is impossible to conclude that the failure to pay treaty mandated compensation, based on a treaty entered in 1863, did not accrue before 1946. There is no indication of any payment after the twenty years required by the text of the Treaty. Therefore, the Court must dismiss this

Count because it was within the exclusive jurisdiction of the ICC.

B. The Finality Provision of the ICCA

Even if jurisdiction over Count III was not placed exclusively in the ICC, the Court would be required to dismiss this Count because of the finality of the ICC Judgment. Plaintiffs' argument that the finality provision of the ICCA is not jurisdictional is untenable. The finality provision, ICCA § 22, states that:

> [P]ayment of any claim, after a determination under the Act, shall be a full discharge of the United States of all claims and demands touching on any of the matters involved in the controversy.
>
> (b) A final determination against a claimant made and reported in accordance with the Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

25 U.S.C. § 70u (1976) (omitted 1978). This provision constitutes a limitation on the Government's waiver of sovereign immunity. *See Dann*, 470 U.S. at 45. Therefore, if it applies to Count III, the finality provision would remove jurisdiction from this Court.

The Court must determine if the finality provision may still apply now that the ICCA has been omitted from the U.S. Code. Plaintiffs argue that the ICCA was repealed effective September 30, 1978 when the ICC was terminated. Pub.L. 94-465, 90 Stat. 1990 (Oct. 8, 1976). Therefore, Plaintiffs argue that § 22 cannot apply to this case because the payment of the ICC judgment was not until December 6, 1979. Plaintiffs assert that the ICCA had been repealed by

that time. Plaintiffs further seek to limit the *Dann* decision to simply deciding when payment occurred, arguing that *Dann* does not decide whether the ICCA applied to payments made after September 30, 1978. This argument, however, miscomprehends the history of the ICCA and the *Dann* decision. There is nothing in the history of the ICCA to indicate that it has ever been repealed. In terminating the ICC, Congress modified two provisions; it did not repeal any. Pub.L. 94-465, 90 Stat. 1990. Instead, the ICCA has been omitted from the U.S. Code after the termination of the ICC. *See* South Fork Band Br. at Ex.'s 5 & 6.

Plaintiffs also fail to explain why the Supreme Court would decide *Dann* if the payment of the ICC judgment would have no effect. Indeed, the *Dann* Court was clearly aware that ICCA § 22 would preclude certain of the Danns' claims if the Court found payment had occurred. The *Dann* Court reversed the Ninth Circuit because the circuit's decision "would frustrate the purpose of finality by *postponing the preclusive effects of § 22(a)* while subjecting the United States to continued liability for claims and demands that 'touch' on the matter previously litigated and resolved by the Indian Claims Commission." *Dann*, 470 U.S. at 45 (emphasis added). Because payment of the ICC judgment occurred after the omission of the ICCA from the U.S. Code, *Dann* clearly establishes that the ICCA' s finality provision may still act to bar claims against the Government.

Plaintiffs' argument that § 22 cannot bar this Count because the final report was never filed also fails to survive review. As discussed above, this cannot be the basis of relief under RCFC 60(b). Further, the Supreme Court clearly stated that the

preclusive effect of § 22 bars further claims upon payment of the ICC award and thus this Court is bound by that determination.

IV. Count IV

In Count IV, Plaintiffs[9] ask the Court to order Defendant to provide "an accounting of the proceeds from disposition or use of the land, including without limitation, mining activities in accordance with Section 4 of the Treaty of Ruby Valley." Compl. ¶ 76. Defendant argues that this Court lacks the necessary equitable jurisdiction to order such an accounting until Defendant's liability is established. Plaintiffs respond that the Court must look at Count IV in conjunction with Counts III and V, and may therefore retain jurisdiction. Further, Plaintiffs allege, and Defendant denies, that Defendant took an inconsistent position in the district court and should not now be allowed to change its position.

Preliminarily, it is clear that no argument made to the district court may alter the subject-matter jurisdiction of this Court. Jurisdiction in this Court may only be conferred by Congress. *E.g. Transcountry Packing Co. v. United States*, 568 F.2d 1333, 1336 (Ct. Cl. 1978). Thus, even if Defendant argued to the district court that this Court was the only court with jurisdiction over this claim, and convinced the district court to transfer the case here, that does nothing to help this Court determine its jurisdiction

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[9] These arguments are the South Fork Band's. The National Council does not argue this issue specifically, but it does expressly incorporate all of the South Fork Band's arguments. National Council, Br. at 1. With this caveat, the Court will also refer to "Plaintiffs" in this section.

over this claim. The subject-matter jurisdiction of this Court cannot be established by estoppel.

The Court finds that it does not have jurisdiction over Count IV. If taken as an independent claim, South Fork Band concedes that this Court lacks jurisdiction. Even if the Court could retain jurisdiction over this Count as South Fork Band argues, the Court cannot do so here because it is dismissing Counts III and V in this opinion. Therefore, the Court dismisses Count IV for lack of subject-matter jurisdiction.

V. Count V

In Count V, Plaintiffs seek damages for alleged breaches of fiduciary duties that Plaintiffs argue were owed by the Government to Plaintiffs. Defendant argues that Count V should be dismissed for lack of subject-matter jurisdiction in this Court. First, Defendant argues, the relief sought in Count V is barred by the exclusivity and finality provisions of the ICCA. Second, Defendant argues that even if Count V survives its ICCA challenge, it is untimely under the six-year statute of limitations found in 28 U.S.C. § 2501 (2000). Plaintiffs[10] respond that the ICCA does not bar this Count and that the statute of limitations has not begun to run in this case because the Government has not repudiated the relationship or provided an accounting of Plaintiffs' funds.

Without reaching the ICCA argument, this claim is clearly out of time under this Court's generally appli-

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[10] These arguments are the South Fork Band's. The National Council does not argue this issue specifically, but it does expressly incorporate all of the South Fork Band's arguments. National Council, Br. at 1. With this caveat, the Court will also refer to "Plaintiffs" in this section.

cable statute of limitations. 28 U.S.C. § 2501. Because § 2501 constitutes a waiver of sovereign immunity, its bar deprives this Court of subject-matter jurisdiction over untimely claims. *E.g. Hopeland Bands of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). The statute of limitations begins to run at the time of "first accrual," which is the time when all of the facts necessary to establish liability have taken place. *Nager Electric Co. v. United States*, 368 F.2d 847, 851 (Ct. Cl. 1966). These facts, of course, must not be inherently unknowable at the time they occur. *Menonominee Tribe v. United States*, 726 F.2d 718, 720-22 (Fed. Cir. 1988). In the case of a trust relationship, the statute does not begin to run on a breach unless the fiduciary expressly repudiates the relationship or provides an accounting of trust funds. *E.g. Osage Tribe of Indians of Oklahoma v. United States*, 68 Fed. Cl. 322 (2005). A trustee, however, may repudiate the relationship through "actions inconsistent with [its] obligations under the trust." *Jones v. United States*, 801 F.2d 1334, 1336 (Fed. Cir. 1986) (citation omitted).

Assuming *arguendo*, that the Government owed a fiduciary duty to the Plaintiffs under the Treaty of Ruby Valley,[11] it is impossible to accept the Plaintiffs' view that the Government has not long ago repudiated such a relationship. Ever since the initial case

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[11] The Supreme Court has held that pervasive control over Indian lands can be found to create a fiduciary relationship with the Government. *United States v. Mitchell*, 463 U.S. 206, 224 (1983). In this case, the language in the Treaty of Ruby Valley does not appear to grant such pervasive control to the United States. Therefore, for the sake of this argument, the Court will assume, without deciding, that such a relationship did exist.

before the ICC, filed in 1951, the Government has denied that the Plaintiffs retained *any* interest in the disputed land. *E.g. Western Shoshone Legal Defense & Educ. Ass'n v. United States*, 531 F.2d 495, 500 (Ct. Cl. 1976) (noting that "the Government consistently maintained that the Indians never owned the lands they claimed"). That position, repeated in numerous cases over 55 years, is irreconcilable with the Government acknowledging its role as a fiduciary. It is also impossible to conclude that Plaintiffs only became aware of the Government's position within the last six years. For the purposes of § 2501, Count V first accrued in the 1950's when the Government denied that the Plaintiffs had any interest in any of the disputed 60 million acres.

The Plaintiffs also point to *Osage Tribe* to support their claim that appropriations acts have set aside the statute of limitations until an accounting has been provided. *Osage Tribe*, however, does not apply to this case because *Osage Tribe* dealt with a trust fund expressly created by statute. *Osage Tribe*, 68 Fed. Cl. at 325-26. In this case, Plaintiffs can only claim that the Treaty of Ruby Valley created a trust relationship with regard to the lands and assets of the land described in the Treaty. However, the Federal Circuit has made it clear that the setting aside of the statute of limitations until an accounting is provided applies only to cases of trust fund mismanagement, not asset mismanagement. *Shoshone Indian Tribe of the Wind River Reservation v. United States*, 364 F.3d 1339, 1350 (Fed. Cir. 2004). Therefore, the Court must dismiss Count V for lack of subject-matter jurisdiction.

CONCLUSION

For the reasons set forth in this opinion, the Court hereby GRANTS Defendant's Motion to Dismiss Plaintiffs' Second Amended Complaint. The Clerk is directed to enter judgment in favor of Defendant.

IT IS SO ORDERED.

/s/ Loren A. Smith
LOREN A. SMITH
Senior Judge

APPENDIX C

RULES OF THE UNITED STATES COURT OF FEDERAL CLAIMS

Revised May 1, 2002

[LOGO]

Minor typographical errors were corrected 4/10/02, 5/17/02, 6/18/02, 9/1/02, and 1/13/03

* * * *

Rule 60. Relief from Judgment or Order

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under RCFC 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct or an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon

which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rules Committee Note

Minor changes in wording were made to more closely conform to FRCP 60. Necessary differences were retained.

* * * *

APPENDIX D

TREATY WITH THE WESTERN SHOSHONI, 1863.

Treaty of Peace and Friendship made at Ruby Valley, in the Territory of Nevada, this first day of October, A. D. one thousand eight hundred and sixty-three, between the United States of America, represented by the undersigned commissioners, and the Western Bands of the Shoshonee Nation of Indians, represented by their Chiefs and Principal Men and Warriors, as follows:

ARTICLE 1.

Peace and friendship shall be hereafter established and maintained between the Western Bands of the Shoshonee nation and the people and Government of the United States; and the said bands stipulate and agree that hostilities and all depredations upon the emigrant trains, the mail and telegraph lines, and upon the citizens of the United States within their country, shall cease.

ARTICLE 2.

The several routes of travel through the Shoshonee country, now or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all emigrants and travellers under its authority and protection, without molestation or injury from them. And if depredations are at any time committed by bad men of their nation, the offenders shall be immediately taken and delivered up to the proper officers of the United States, to be punished as their offences shall deserve; and the safety of all travellers passing peaceably over either of said routes is hereby guarantied by said bands.

Military posts may be established by the President of the United States along said routes or elsewhere in their country; and station houses may be erected and occupied at such points as may be necessary for the comfort and convenience of travellers or for mail or telegraph companies.

ARTICLE 3.

The telegraph and overland stage lines having been established and operated by companies under the authority of the United States through a part of the Shoshonee country, it is expressly agreed that the same may be continued without hindrance, molestation, or injury from the people of said bands, and that their property and the lives and property of passengers in the stages and of the employees of the respective companies, shall be protected by them. And further, it being understood that provision has been made by the government of the United States for the construction of a railway from the plains west to the Pacific ocean, it is stipulated by the said bands that the said railway or its branches may be located, constructed, and operated, and without molestation from them, through any portion of country claimed or occupied by them.

ARTICLE 4.

It is further agreed by the parties hereto, that the Shoshonee country may be explored and prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked, and mining and agricultural settlements formed, and ranches established whenever they may be required. Mills may be erected and timber taken for their use, as also for building and other purposes in any part of the country claimed by said bands.

ARTICLE 5.

It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:

> On the north by Wong-goga-da Mountains and Shoshonee River Valley; on the west by Su-non-to-yah Mountains or Smith Creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

ARTICLE 6.

The said bands agree that whenever the President of the United States shall deem it expedient for them to abandon the roaming life, which, they now lead, and become herdsmen or agriculturalists, he is hereby authorized to make such reservations for their use as he may deem necessary within the country above described; and they do also hereby agree to remove their camps to such reservations as he may indicate, and to reside and remain therein.

ARTICLE 7.

The United States, being aware of the inconvenience resulting to the Indians in consequence of the driving away and destruction of game along the routes travelled by white men, and by the formation of agricultural and mining settlements, are willing to fairly compensate them for the same; therefore, and in consideration of the preceding stipulations, and of their faithful observance by the said bands, the United States promise and agree to pay to the said bands of the Shoshonee nation parties hereto, annually for the term of twenty years, the sum of five thousand dollars in such articles, including cattle for

herding or other purposes, as the President of the United States shall deem suitable for their wants and condition, either as hunters or herdsmen. And the said bands hereby acknowledge the reception of the said stipulated annuities as a full compensation and equivalent for the loss of game and the rights and privileges hereby conceded.

ARTICLE 8.

The said bands hereby acknowledge that they have received from said commissioners provisions and clothing amounting to five thousand dollars as presents at the conclusion of this treaty.

Done at Ruby Valley the day and year above written.

James W. Nye.
James Duane Doty.

Te-moak, his x mark.	Po-on-go-sah, his x mark.
Mo-ho-a.	Par-a-woat-ze, his x mark.
Kirk-weedgwa, his x mark.	Ga-ha-dier, his x mark.
To-nag, his x mark.	Ko-ro-kout-ze, his x mark.
To-so-wee-so-op, his x mark.	Pon-ge-mah, his x mark.
Sow-er-e-gah, his x mark.	Buck, his x mark.

Witnesses:

J.B.Moore, lieutenant-colonel Third Infantry California Volunteers.

Jacob T.Lockhart, Indian agent Nevada Territory.

Henry Butterfield, interpreter.

Oct. 1, 1863. 1 18 Stats., 689. 1 Ratified June 26, 1866. 1 Proclaimed Oct. 21, 1869.

EXHIBIT B

Best Available Copy

APPENDIX E

[CHAPTER 959]

AN ACT

To create an Indian Claims Commission to provide for the powers, duties and functions thereof, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That there is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

JURISDICTION

SEC. 2 The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in court of the United States if the United States was subject to suit; (3) claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by the court of equity; (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the clamant without the payment for such lands

of compensation agreed to by the claimant; and (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of the Act shall be considered by the Commission.

All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches, but all other defenses shall be available to the United States.

In determining the quantum of relief the commission shall make appropriate deductions for all payments made by the United States on the claim, and for all other offsets, counterclaims, and demands that would be allowable in a suit, brought in the Court of Claims under section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C. sec 250), as amended; the Commission may also inquire into and consider all money or property given to or funds expended gratuitously for the benefit of the claimant and if it finds that the mature of the claim and the entire course of dealings and accounts between the United States and the claimant in good conscience warrants such action, may set off all or part of such expenditures against any award made to the claimant, except that it is hereby declared to be the policy of Congress that monies spent for the removal of the claimant from on e place to another at the request of the United States, or for agency or other administrative, educational, health or highway purposes, or for expenditures made prior to the date of the law, treaty, or Executive Order under which the claim arose or for expenditures made pursuant to the Act of June 18, 1934 (48 Stat 984), save expenditures made under section 5 of that Act or for expenditures under

any emergency appropriation or allotment made subsequent to March 4, 1933 and generally applicable throughout the United States for relief in stricken agricultural areas, relief of unemployment and conditions resulting therefrom, the prosecutions of public work and public projects for the relief of unemployment or to increase employment and for work relief including Civil Works Program shall not be a proper offset against any award.

MEMBERSHIP APPOINTMENT: OATH: SALARY

SEC. 3. (a) The Commission shall consist of a Chief Commissioner and two Associate Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate, and each of whom shall receive a salary of $10,000 per year. Ar all times at least two members of the Commission shall be members of the bar of the Supreme Court of the United States in good standing: *Provided further.* That not more than two of the members shall be of the same political party. Each of them shall take an oath to support the Constitution of the United States and to discharge faithfully the duties of his office.

TERM OF OFFICE [ILLEGIBLE] REMOVAL

* * * until the dissolution of the Commission as hereinafter provided. Vacancies shall be filled in the same manner as the original appointments. Members of the Commission may be removed by the President for cause after notice and opportunity to be heard.

NOT TO ENGAGE IN OTHER VOCATIONS OR REPRESENT TRIBES

(c) No Commissioner shall engage in any other business, vocation or employment during his term of

office not shall be, during his term of office or for a period of two years thereafter, represent any Indian tribe, band or group in any matter whatsoever, or have any financial interest in the outcome of any tribal claim. Any person violating the provisions of this subdivision shall be fined not more than $10,000 or imprisoned more than two years, or both.

QUORUM

(d) Two embers shall constitute a quorum, and the agreement of two members shall be necessary to any and all determinations for the transaction of the business of the Commission, and, if there be a quorum, no vacancy shall impair or affect the business of the Commission or its determinations.

STAFF OF COMMISSION

SEC. 4. The Commission shall appoint a clerk and such other employees as shall be requisite to conduct the business of the Commission. All such employees shall take oath for the faithful discharge of their duties and shall be under the direction of the Commission in the performance thereof.

OFFICES

SEC. 5. The principal office of the Commission shall be in the District of Columbia.

EXPENSES OF COMMISSION

SEC. 6. All necessary expenses of the Commission shall be paid on the presentation of itemized vouchers therefore approved by the Chief Commissioner or other member or officer designated by the Commission.

TIME OF MEETINGS

SEC. 7. The time of the meetings of the Commission shall be prescribed by the Commission.

RECORD

SEC. 8. A full written record shall be kept of all hearings and proceedings of the Commission and shall be open to public inspection.

CONTROL OF PROCEDURE

SEC. 9. The Commission shall have power to establish its own rules of procedure.

PRESENTATION OF CLAIM

SEC. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion or laches on the part of such organization be shown to the satisfactory of the Commission.

* * * *

SEC. 17. The Commission shall give reasonable notice to the interested parties and an opportunity for them to be heard and to present evidence before making any final determination upon any claim. Hearings may be held in any part of the United States or in the territory of Alaska.

* * * *

Sec. 22. (a) When the report of the Commission determining any claimant to be entitled to recover has been filed with Congress, such report shall have the effect of a final judgment of the Court of Claims, and there is hereby authorized to be appropriated such sums as are necessary to pay the final determination of the Commission.

The payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.

(b) A final determination against a claimant made and reported in accordance with the Act shall forever bar any further claim or demand against the United States arising out of the matter involved in the controversy.

* * * *

APPENDIX F

UNITED STATES PUBLIC LAWS
94th Congress - Second Session
Convening January 19, 1976

DATA SUPPLIED BY THE U.S. DEPARTMENT OF JUSTICE. (SEE SCOPE)
Additions and Deletions are not identified in this document.

PL 94-465 (S 2981)
OCTOBER 8, 1976

An Act to authorize appropriations for the Indian Claims Commission for fiscal year 1977, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is authorized to be appropriated to carry out the provisions of the Indian Claims Commission Act (25 U.S.C. 70), during fiscal year 1977, not to exceed $1,650,000.

Sec. 2. Section 23 of the Act entitled "An Act to create an Indian Claims Commission, to provide for the powers, duties and functions thereof, and for other purposes", approved August 13, 1946 (60 Stat. 1049, 1055), as amended (86 Stat. 115: 25 U.S.C. 70v), is hereby amended by striking said section and inserting in lieu thereof the following:

"DISSOLUTION OF THE COMMISSION AND DISPOSITION OF PENDING CLAIMS

"Sec. 23. The existence of the Commission shall terminate at the end of fiscal year 1978 on Septem-

ber 30, 1978, or at such earlier time as the Commission shall have made its final report to the Congress on all claims filed with it. Upon its dissolution, the records and files of the Commission in all cases in which a final determination has been entered shall be delivered to the Archivist of the United States. No later than December 31, 1976, the Indian Claims Commission may certify and transfer to the Court of Claims all cases which the Commission determines it cannot completely adjudicate by September 30, 1978. In addition, the Commission may, at any time prior to September 30. 1978. certify and transfer to the Court of Claims any case which it determines cannot be completely adjudicated prior to the dissolution of the Commission. Jurisdiction is hereby conferred upon the Court of Claims to adjudicate all such cases under the provisions of section 2 of the Indian Claims Commission Act: Provided, That section 2 of said Act shall not apply to any cases filed originally in the Court of Claims under section 1505 of title 28, United States Code. Upon dissolution of the Commission, all pending cases including those on appeal shall be transferred to the Court of Claims for adjudication on the same basis as those authorized to be transferred by this section."

Sec. 3. Section 28 of such Act of August 13, 1946, as amended (25 U.S.C. 70v-2), is amended by striking said section and inserting in lieu thereof the following:

"STATUS REPORT TO CONGRESS

"Sec. 28. The Commission shall, on the first day of the 95th Congress, submit a report to the Committees on Interior and Insular Affairs of the Senate and House of Representatives on those cases which it

has transferred pursuant to section 23 of this Act. // 25 USC 70v. // as amended. In addition, the Commission shall submit a report to said Committees at six month intervals thereafter showing the progress made and the work remaining to be completed by the Commission, as well as the status of each remaining case, along with the projected date for its completion."

LEGISLATIVE HISTORY:

HOUSE REPORT No. 94--1150 accompanying H.R. 11909 (Comm. on Interior and Insular Affairs).

SENATE REPORT No. 94-737 (Comm. on INTERIOR and Insular Affairs).

CONGRESSIONAL RECORD, Vol. 122 (1976):

Apr. 9, considered and passed Senate.

Aug. 3, considered and passed House, amended, in lieu of H.R. 11909. Sept. 28, Senate agreed to conference report.

Sept. 29, House agreed to conference report.

Approved October 8, 1976.

UNITED STATES CODE
TITLE 25.—INDIANS
CHAPTER 2A—INDIAN CLAIMS COMMISSION

General Materials (GM)—
References, Annotations, or Tables

HISTORICAL AND STATUTORY NOTES

§§ 70 to 70n-2. Omitted

Codifications

Section 70, Act Aug. 13, 1946, c. 959. § 1, 60 Stat. 1049, which established the Indian Claims Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70a, Act Aug. 13, 1946, c. 959. § 2, 60 Stat. 1050; Oct. 27, 1974, Pub.L. 93-494, § 2, 88 Stat. 1499, which related to the jurisdiction of the Commission, claims considered by the Commission. and offsets and counterclaims, was omitted from the Code in that the Commission terminated on Sept. 30. 1978.

Section 70b, Act Aug. 13, 1946, c. 959. § 3, 60 Stat. 1050; Act Apr. 10, 1967, Pub.L. 90-9. §§ 2. 3, 81 Stat. 11, Oct. 12, 1978, Pub.L. 95-453. 92 Stat. 1110, which related to the members of the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70c, Act Aug. 13, 1946, c. 959. § 4, 60 Stat. 1051, which related to the staff and oath of the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70d, Act Aug. 13, 1946, c. 959, § 5, 60 Stat. 1051, which related to the principal office of the

Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70e, Act Aug. 13, 1946, c. 959. § 6, 60 Stat. 1051, Apr. 10, 1967, Pub.L. 90-9, § 4. 81 Stat. 11: Mar. 30, 1972, Pub.L. 92-265, § 5, 86 Stat. 115, which related to itemized vouchers and authorized appropriations, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70f, Act Aug. 13, 1946, c. 959. § 7. 60 Stat. 1051. which related to the time of Commission meetings, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70g, Act Aug. 13, 1946, c. 959. § 8. 60 Stat. 1051, which related to the record of proceedings and public inspection of such records, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70h, Act. Aug. 13, 1946. c. 959. § 9. 60 Stat. 1051, which related to control of Commission procedure, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70i, Act Aug. 13, 1946. c. 959. § 10. 60 Stat. 1052, which related to presentation of claims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70j, Act Aug. 13, 1946, c. 959. § 11, 60 Stat. 1052, which related to the forbidden transfer of suits in Court of Claims under prior Acts and offsets and counterclaims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70k, Act Aug. 13, 1946, c. 959. § 12, 60 Stat. 1052, which related to the limitation of time for presenting claims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70l, Act Aug. 13, 1946, c. 959, § 13, 60 Stat. 1052, which related to notice to tribes, investigation of claims, and availability of data, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70m, Act Aug. 13, 1946, c. 959, § 14, 60 Stat. 1052, which related to information from governmental departments and official records as evidence, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n, Act Aug. 13, 1946, c. 959, § 15, 60 Stat. 1053, which related to attorneys of claimants and the representation of the United States by the Attorney General, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-1, Pub.L. 88-168, § 1, Nov. 4, 1963, 77 Stat. 301; Pub.L. 89-592, Sept. 19, 1966, 80 Stat. 814; Pub.L. 93-37, § 2, May 24, 1973, 87 Stat. 73, which related to expert assistance for preparation and trial of claims and a revolving fund established for loans, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-2, Pub.L. 88-168, § 2, Nov. 4, 1963, 77 Stat. 301, which related to the inability of applicants to pay for assistance required and the denial of loans in cases of unreasonable fees, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Indian Self-Determination Conflict of Interest Requirement Inapplicable to Commissioner Not in Office

Section 1 of Pub.L. 95-453 provided in part that § 45040 of this title shall not apply to those members

of the Indian Claims Commission affected by the Indian Self-Determination Act.

25 U.S.C.A. § 70, 25 USCA § 70

UNITED STATES CODE ANNOTATED
TITLE 25.—INDIANS
CHAPTER 2A—INDIAN CLAMS COMMISSION

General Materials (GM)—
References, Annotations, or Tables

HISTORICAL AND STATUTORY NOTES

§§ 70n-4 to 70v-3. Omitted

Section 70n-4, Pub.L. 88-168, § 4, Nov. 4, 1963, 77 Stat. 301, which related to interest, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-5, Pub.L. 88-168, § 5, Nov. 4, 1963, 77 Stat. 301, which related to crediting to revolving fund of repayments and interest, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-6, Pub.L. 88-168, § 6, Nov. 4. 1963. 77 Stat. 301, which related to the liability of the United States, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70n-7, Pub.L. 88-168, § 7, Nov. 4, 1963, 77 Stat. 301, which prohibited approval of contingent fee contracts, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70o, Act Aug. 13, 1946, c. 959, § 16, 60 Stat. 1053, which forbade a member of Congress from practicing before the Commission, was omitted from the Code in that the Commission terminated on Sept. 30. 1978.

Section 70p, Act Aug. 13, 1946, c. 959, § 17, 60 Star. 1053, which related to hearings, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70q, Act Aug. 13, 1946, c. 959, § 18, 60 Stat. 1054; Apr. 10, 1967, Pub.L. 90-9, § 4, 81 Stat. 11, which related to the testimony of witnesses, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70r, Act Aug. 13, 1946, c. 959, § 19. 60 Stat. 1054, which related to final determinations of Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70s, Act Aug. 13, 1946, c. 959, § 20, 60 Stat. 1054, Sept. 8, 1960, Pub.L. 86-722, 74 Stat. 829, Mar. 13, 1978, Pub.L. 95-243, 92 Stat. 153, which related to judicial review, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70t, Act Aug. 13, 1946, c. 959, § 21, 60 Stat. 1055, which related to a report of determination of claim to Congress, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70u, Act Aug, 13, 1946, c. 959, § 22, 60 Stat. 1055, which related to the payment of claim after final determination and an adverse determination as a bar to further claims, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70v, Act Aug. 13, 1946, c. 959, § 23, 60 Stat. 1055; Act July 24, 1956, c. 679, 70 Stat. 624; June 16, 1961, Pub.L. 87-48, 75 Stat. 92; Apr. 10, 1967, Pub.L. 90-9, § 1. 81 Stat. 11, Mar. 30, 1972, Pub.L. 92. 265, § 1, 86 Stat. 114; Oct. 8, 1976, Pub.L. 94465, § 2, 90

Stat. 1990, which related to the dissolution of the Commission, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70v-1, Act"Aug. 13, 1946, c. 959, § 27, as added Apr. 10, 1967, Pub.L. 90-9, § 5, 81 Stat. 11, and amended Mar. 30, f972, Pub.L. 92-265, §§ 2, 3, 86 Stat. 115, which related to the trial calendar, was omitted from the Code in that thc Commission terminated on Sept. 30, 1978.

Section 70v-2, Act Aug. 13, 1946, c. 959, § 28, as added Mar. 30, 1972, Pub.L. 92-265, § 4, 86 Stat. 115, and amended Oct. 8, 1976, Pub.L. 94-465, § 3, 90 Stat. 1990, which related to status reports to Congress, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

Section 70v-3, Act Aug. 13, 1946, c. 959, § 29, as added July 20, 1977, Pub.L. 95-69, § 2, 91 Stat. 273, and amended Apr. 2, 1982, Pub.L. 97-164, Title I, § 149, 96 Stat. 4.6, which related to cases transferred to United States Claims Court, was omitted from the Code in that the Commission terminated on Sept. 30, 1978.

25 U.S.C.A. § 70v-3

25 USCA § 70v-3

APPENDIX G

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

[Filed July 15, 2005]

No. 05-558L
Judge Emily C. Hewitt

WESTERN SHOSHONE NATIONAL COUNCIL, *et al.*,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
Defendant.

SECOND AMENDED COMPLAINT

Plaintiffs, Western Shoshone National Council, South Fork Band, Winnemucca Indian Colony, Dann Band, Te-Moak Tribe of Western Shoshone Indians, Battle Mountain Band, Elko Band, and Timbisha Shoshone Tribe, by and through undersigned counsel, bring this Complaint against the United States, and state as follows:

PARTIES AND JURISDICTION

1. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. §§ 1331, 1362, 1491 and 1505. This is a civil action brought by Indian Tribes or bands and arises under the Constitution, treaties and agreements between the United States and the Tribe, federal common law and the federal statutes.

2. Plaintiff Western Shoshone National Council is a governing body of the Western Shoshone Nation, and represents the interests of certain Western Shoshone tribes and bands which are parties and successors in interest to the Treaty of Ruby Valley.

3. Plaintiff Te-Moak Tribe of Western Shoshone Indians ("Te-Moak Tribe") is a federally recognized tribe which acts as representative body of Battle Mountain Band, Elko Band South Fork Band and Wells Band.

4. Plaintiff South Fork Band is a federally recognized band of the Te-Moak Tribe.

5. Plaintiff Battle Mountain Band is a federally recognized band of the Te-Moak Tribe.

6. Plaintiff Elko Band is a federally recognized band of the Te-Moak Tribe.

7. Plaintiff Winnemucca Indian Colony is a band of Western Shoshone Indians.

8. Plaintiff Dann Band is a traditional Western Shoshone family and this action is brought through its representatives Mary Dann and Carrie Dann.

9. Plaintiff Timbisha Shoshone Tribe is a federally recognized tribe.

GENERAL ALLEGATIONS

The Western Shoshone Nation

10. The Western Shoshone people identify themselves as *Newe,* a word that means "the people." Their homelands stretch in the north from the Snake River Valley in Idaho, in the east from Salt Lake Valley in Utah, in the west across most of eastern and central Nevada, and southward into Death Valley and the Mojave Desert of California. Most of these lands are within what is known as the Great Basin, a high alti-

tude desert with no external drainage to the ocean. (The Western Shoshone homelands shall be referred to as the "Western Shoshone Land Base".)

11. Prior to the appearance of white people, the Western Shoshone lived in extended family groups, congregating together in times of ceremony or collective food gathering activities, such as antelope drives and pinenut picking.

12 The Western Shoshone people have continuously owned and occupied the Western Shoshone Land Base since time immemorial.

13. Today the Western Shoshone people generally live in various communities, some of which include: Battle Mountain Indian Colony, Elko Indian Colony, Wells Indian Colony, South Fork Reservation, Ruby Valley Allotments, Odgers Ranch, Dann Ranch, Yomba Reservation, Duckwater Reservation, Ely Indian Colony, Winnemucca Indian Colony and the Timbisha Community.

14. The Western Shoshone Nation is comprised of bands or tribes of Native American Indians. Some of the Bands are formally recognized by the Congress of the United States under the Indian Reorganization Act.

15. The people of the Western Shoshone, and their bands, tribes and communities shall be collectively referred to as the "Western Shoshone Nation". Plaintiffs bring this action on behalf of themselves and the Western Shoshone Nation.

16. The Western Shoshone Nation owns and occupies a large tract of land in Nevada, California, Idaho and Utah which exceeds over 60 million acres.

The Treaty of Ruby Valley

17. On October 1, 1863 the United States government and the Western Shoshone Nation entered into a treaty known as the Treaty With The Western Shoshone, 1863. 18 Stat. 689, Ratified June 26, 1866, Proclaimed October 21, 1869. (The "Treaty of Ruby Valley") A copy of the Treaty of Ruby Valley is attached hereto as Exhibit A.

18. The Treaty of Ruby Valley is a valid and binding contract between the United States and the Western Shoshone Nation. The Treaty of Ruby Valley is enforceable by law.

19. Article 5 of the Treaty of Ruby Valley states as follows:

> It is understood that the boundaries of the country claimed and occupied by said bands are defined and described by them as follows:
>
> On the north by Wong-goga-da Mountains and Shoshone River Valley; on the west by Su-non-to-yah Mountains or Smith creek Mountains; on the south by Wi-co-bah and the Colorado Desert; on the east by Po-ho-no-be Valley or Steptoe Valley and Great Salt Lake Valley.

The boundaries described in Article 5 are generally shown in the map attached hereto as Exhibit B. (The land described in Article 5 of the Treaty of Ruby Valley shall be referred to as the "Western Shoshone Fee Title Land".)

20. The Congress of the United States expressly recognized permanent ownership of Western Shoshone Fee Title Land in the Western Shoshone Nation when it ratified the Treaty of Ruby Valley on June 26, 1866.

21. The Western Shoshone Nation continues to own the Western Shoshone Fee Title Land. The Western Shoshone ownership includes all rights typically associated with such title, including without limitation, the right to hunt and fish, and to live and work the land (for example, all rights to farming, ranching and grazing). Also encompassed within this title are all mineral rights from the land including gold, silver, copper, timber and water.

22. The Western Shoshone Nation continues to occupy and use a substantial portion of the Western Shoshone Land Base.

23. Under the Treaty of Ruby Valley, the Western Shoshone Nation granted the United States certain privileges for use of and access to the land described in the Treaty and, in exchange, the United States recognized Western Shoshone ownership of the land which under U.S. law equates to statutory or fee title.

24. Article 2 of the Treaty of Ruby Valley provides that "[t]he several routes of travel through the Shoshone country, nor or hereafter used by white men, shall be forever free, and unobstructed by the said bands, for the use of the government of the United States, and of all the emigrants and travellers under its authority and protection. . ." Article 2 further authorizes the Government to establish military posts and station houses in the Shoshone country.

25. Article 3 of the Treaty allows the continuation of "telegraph and overland stage lines", and also allows for the construction of a railway and its branches through Shoshone country. Article 4 of the Treaty provides that the Western Shoshone Fee Title Land may be "prospected for gold and silver, or other minerals; and when mines are discovered, they may be worked,

and mining and agricultural settlements formed, and ranches established whenever they may be required."

26. The Treaty of Ruby Valley thus provides the U.S. Government and private citizens acting under the authority of the U.S. Government with certain rights and privileges to use and occupy the Western Shoshone Fee Title Land, which are not inconsistent with the Western Shoshone Nation's Fee Title and concomitant rights in the Western Shoshone Fee Title Land.

27. Article 7 of the Treaty of Ruby Valley provides that the United States shall provide fair compensation to the Western Shoshone Nation for use of the Western Shoshone Fee Title Land. (The Treaty provides that for the first twenty years, the amount of compensation shall be $5,000 per year.) Since the Treaty of Ruby Valley was signed, many gold mines have been discovered and exploited. Upon information and belief, most of the gold produced in the United States comes from the Western Shoshone Fee Title Land. The Western Shoshone Nation has never received an accounting from the United States on the minerals taken from the Western Shoshone Fee Title Land.

28. In the late 19th century and throughout the 20th century, mining and agricultural settlements were formed and ranches were established on the Western Shoshone Fee Title Land.

The Indian Claims Commission

29. In 1951, a Petition was filed against the United States of America by the Te-Moak Bands of Western Shoshone Indians before the Indian Claims Commission (the "ICC"). The Te-Moak Bands alleged in the Petition that they represented the Western Bands of

the Shoshone Nation. The ICC petition was assigned docket No. 326 (hereinafter the "ICC Claim").

30. The ICC Claim was filed by the law firm of Wilkinson, Cragun & Barker (the "Barker Law Firm").

31. Count 1 of the ICC Claim plead a "Taking of Lands" and alleged that (a) the Western Shoshone Nation owned and occupied certain land since time immemorial ("Aboriginal Title"), and (b) the Western Shoshone Nation held recognized title and ownership to land under the Treaty of Ruby Valley (Western Shoshone Fee Title Land).

32. Count 2 of the ICC Claim plead a "General Accounting" for funds collected and managed by the United States on behalf of the Western Shoshone Nation.

33. During the course of the litigation before the ICC, the Te-Moak Bands (the original plaintiff) realized that the Barker Law Firm was not acting pursuant to their instructions. Specifically, counsel refused to assert the position that the Western Shoshone Land Base was not taken by the government. Ultimately, the Te-Moak Bands fired the Barker Law Firm. The BIA refused to accept this discharge of counsel and renewed the legal contract of the Barker Law Firm on behalf of the Te-Moak Bands. The Te-Moak Bands filed a notice of discharge of counsel with the ICC. Despite the discharge of counsel, the ICC, the Barker Law Firm and the United States moved forward, with the Barker Law Firm purportedly representing the interests of the petitioners.

34. The ICC, the Barker Law Firm and the United States created a fiction known as the Western Shoshone identifiable group during the early stages of the litigation. This fictional entity was alleged to be

the de facto plaintiff after the Te-Moak Bands terminated their counsel.

35. The Western Shoshone identifiable group was not and is not a recognized legal entity by the Western Shoshone people and had no authority to represent the interests of the Western Shoshone Nation or its people. Upon information and belief, after the Te-Moak Bands terminated the Barker Law Firm, the Barker Law Firm had no representative, decision-making client other than the BIA.

36. On October 16, 1962 the ICC issued Findings of Fact, determining that the Western Shoshone identifiable group held certain land under Aboriginal Title and that the United States had extinguished the Western Shoshone's Aboriginal Title without compensation as follows:

> The Commission further finds. . . the Western Shoshone identifiable group exclusively used and occupied their respective territories as described in Finding . . . 23 (except the Western Shoshone lands in the present State of California) until by gradual encroachment by whites, settlers and others, and the acquisition, disposition or taking of their lands by the United States for its own use and benefit, or the use and benefit of its citizens, the way of life of these Indians was disrupted and they were deprived of their lands. 11 Ind.Cl.Comm. 387, 416.

37. Paragraph 23 of the Findings of Fact contained a description of territory which encompassed approximately 24 million acres of land.

38. The Commission did *not* make any finding relating to the Western Shoshone Fee Title Land in its Findings of Fact. Nor did it make any findings re-

garding the land not described and encompassed within the approximate 24 million acres set forth in Paragraph 23' of its Findings of Fact.

39. On October 16, 1962 the ICC issued an Opinion of the Commission (the "1962 Opinion") and held:

> "The Commission also concludes that the . . . Western Shoshone identifiable group w[as] [a] land-using entit[y] which respectively held Indian title to the lands described in Findings of Fact Nos. 21, 22 and 23, and that said Indian title was acquired by the United States from th[is] . . . aforementioned land-using entit[y] without the payment of compensation therefor and said land-using entit[y is] entitled to recovery under Section 2, Clause (4) of the Indian Claims Commission Act . . . The Indian title of the Western Shoshone group in their lands located in California was extinguished by the United States on March 3, 1853, *Mohave Tribe v. United States*, 7 Ind. Cl. Comm. 219. The case will now proceed to a determination of the dates of . . . extinguishment of the Indian title of the lands of the Western Shoshone group which were not within the boundaries of the present State of California; 11 Ind.Cl.Comm. 387, 445."

40. The Commission did not make any ruling relating to the Western Shoshone Fee Title Land in the 1962 Opinion.

41. On February 11, 1966, the ICC approved a joint stipulation setting the date for valuation of the land described in its 1962 opinion as of July 1, 1872.

42. On October 11, 1972, the ICC issued an Opinion of the Commission (the "1972 Opinion") and held that the fair market value of the land held by Abo-

riginal Title (described in paragraph 23 of the Findings of Fact) on the date of taking was $21,550,000 and the value of minerals removed from the land prior to the taking was $4,604,600 for a total of $26,154,600 (the "ICC Judgment").

43. The Commission did not make any ruling relating to the Western Shoshone Fee Title Land in the 1972 Opinion.

44. In 1946, Congress enacted the Indian Claims Commission Act, 60 Stat. 1049, 25 U.S.C. §70 *et. seq.* (1976 ed). ("ICCA"). The ICCA was substantially repealed as of September 30, 1978, including 25 U.S.C. §70u, Act Aug. 13, 1946, c. 959, §22, 60 Stat. 1055. (See PL 94-465, Oct. 8, 1976, 90 Stat. 1990). This repealed provision stated that "the payment of any claim, after its determination in accordance with this Act, shall be a full discharge of the United States of all claims and demands, touching on any of the matters involved in the controversy." *Id.*, §22(a). The ICC Judgment was certified by the U.S. Court of Claims for payment on December 6, 1979. The Government then placed the $26.1 million award of the ICC Judgment in trust. In *United States v. Dann*, 470 U.S. 39, 105 S.Ct. 1058 (1985), the Supreme Court held that "payment" of the award of the ICC Judgment had been effected upon the deposit of these funds into a trust account. Nonetheless, on December 6, 1979 when the award of the ICC Judgment was certified, and thereafter when "payment" was made in accordance with the Supreme Court's determination, Section 22(a) of the ICCA had been terminated and omitted from the U.S. Code and was inapplicable. There was, as a result, no discharge pursuant to §22(a) of claims of the Western Shoshone Nation, including the claims set forth herein.

45. Not only did the ICC Judgment not effect a discharge of the United States, but the ICC Judgment never became final. Under the ICCA, a judgment of the ICC becomes final upon the submission of a "final report" to Congress. It has recently been discovered that no final report was ever submitted to Congress on the ICC Judgment.

The Relationship Between the Western Shoshone Nation and the United States

46. Principles of honesty and fair dealing have controlled the government's dealing with Indian nations. Treaties between Indian Tribes and the United States are to be interpreted as the Indians understood them, with any ambiguities construed liberally in favor of the Tribes.

47. The United States has taken on or has exercised some control or supervision over the Western Shoshone land and the management of the resources from the land.

COUNT I

(Declaratory Judgment - ICC Judgment Void Pursuant to Fed.R.Civ.P. 60(b)(4))

48. Plaintiff repeats and realleges the allegations in paragraphs 1 through 47 above.

49. The ICC Judgment was rendered in an absence of due process. The Barker Law Firm continued to represent the "petitioners" after being terminated by the Te-Moak Bands. In an apparent conflict of interest, the BIA renewed the contract of the Barker Law Firm to continue to represent the Te-Moak Bands in the ICC proceeding against the government. The true representatives of the Western Shoshone people attempted to change, withdraw or dismiss the ICC claim

prior to final determination, but were not allowed to do so by the government or the courts. The ICC Judgment was thereafter obtained by dismissed counsel representing a fictitious entity.

50. Such a judgment, which purports to bind all Western Shoshone tribes and bands, lacks the fundamental requisites of due process of law under the Fifth Amendment to the Constitution. In this regard, the Western Shoshone people have a protectible property interest in their rights in the Western Shoshone Land Base; the government deprived the Western Shoshone people of that interest by means of the ICC Judgment; the Western Shoshone people were denied adequate procedural protections in the manner in which the ICC Judgment was rendered, without their counsel of choice and without being allowed to change or withdraw their claim; and the Plaintiffs herein and the Western Shoshone Nation were not parties in the ICC proceeding and their interests were not represented for purposes of Constitutional due process by the Western Shoshone identifiable group.

51. There is an actual controversy regarding the legal effect of the ICC Judgment.

52. Plaintiffs seek a judgment pursuant to 28 U.S.C. §2201 declaring the ICC Judgment to be unenforceable against the Plaintiffs, or void under Fed.R.Civ.P. 60(b)(4) on grounds of failure of due process.

53. The ICC, by proceeding forward to judgment under the circumstances set forth herein, engaged in a clear and egregious usurpation of judicial power.

54. Because the ICC Judgment is unenforceable against the Plaintiffs or void, Plaintiffs herein assert treaty title and aboriginal title to the entire Western Shoshone Land Base, all 60 million acres.

55. WHEREFORE, Plaintiffs demand a declaration that the ICC Judgment is unenforceable or void, and such other and further relief as this Court deems just and proper.

COUNT II

(Declaratory Judgment –
Interest on Takings Award)

56. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

57. This claim is in the alternative and assumes that the ICC Judgment is valid.

58. The award of $26.1 million by the ICC was alleged to be based upon the fair market value of the subject land as of July 1, 1872. Pre-judgment interest, from 1872 to the date of the ICC's Judgment, was not awarded.

59. If the award on the ICC claim encompassed the taking of Western Shoshone Fee Title Land, then it was and remains a well established principle of law that the Western Shoshone Nation would have been entitled to an award of pre judgment interest. If, however, the award of the ICC Judgment encompassed only Aboriginal Title, then the Western Shoshone Nation would not have been entitled to pre judgment interest.

60. The ICC Findings of Fact and the ICC Judgment did not address the Western Shoshone Fee Title Land. Whether the ICC Judgment encompasses the Plaintiffs' claims to the Western Shoshone Fee Title Land is a matter in controversy.

61. If this Court were to determine that the treaty and statutory rights of the Western Shoshone Nation in the Western Shoshone Fee Title Land were extin-

guished by the ICC Judgment, then Plaintiffs seek a declaration pursuant to 28 U.S.C. §2201 that the Western Shoshone Nation is entitled to compounded pre-judgment interest on the award from July 1, 1872 to the date of the ICC Judgment.

62. The amount of interest due under this count exceeds $14 billion.

63. WHEREFORE, Plaintiffs demand declaratory relief, in the alternative to Count I, of entitlement to pre judgment interest from July 1, 1872 to the date of the ICC Judgment, and such other and further relief as this Court deems just and proper.

COUNT III

(Declaratory Judgment - Right to Royalties for Use of Land)

64. Plaintiffs repeat and reallege allegations 1 through 47 above.

65. The Western Shoshone Nation is entitled to fair compensation for use of the Western Shoshone Fee Title Land and the Western Shoshone Land Base pursuant to Articles 4 and 7 of the Treaty of Ruby Valley. Fair compensation requires, among other things, payment of reasonable royalties on all minerals mined and extracted from the Western Shoshone Fee Title Land and the Western Shoshone Land Base.

66. Upon information and belief, there is an actual controversy regarding Plaintiffs' entitlement to fair and reasonable royalties under the Treaty of Ruby Valley.

67. Pursuant to 28 U.S.C. §2201, Plaintiffs seek a declaration that the Western Shoshone Nation is entitled to fair and reasonable compensation for past,

present and future use of the Western Shoshone Fee Title Land and Western Shoshone Land Base.

68. WHEREFORE, Plaintiffs demand a final judgment declaring their rights to fair and reasonable compensation for use of land under the Treaty of Ruby Valley, and for such other and further relief as this Court deems just and proper.

COUNT IV

(Accounting)

69. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

70. Under the Treaty of Ruby Valley and Federal law, the U.S. Government undertook a duty to control and manage the Western Shoshone land.

71. The books of account and records pertaining to moneys and financial transactions of and for the Western Shoshone Nation have been maintained in the exclusive possession and control of the United States.

72. At all relevant times, Defendant has been under a duty to pay interest to the Western Shoshone Nation on funds received by the United States arising from use or disposition of the Western Shoshone land.

73. At all relevant times, Defendant has been under a duty as fiduciary to invest funds coming into the United States' possession for the benefit of the Western Shoshone Nation.

74. Defendant owes the Western Shoshone Nation a fiduciary duty and obligations of the highest responsibility to administer the Western Shoshone land

and funds with the greatest skill and care possessed by a fiduciary.

75. Defendant's fiduciary duties include, among others, the duty to provide the Western Shoshone Nation with a full and complete accounting of their funds.

76. Defendant has failed to provide the Western Shoshone Nation with an accounting of the proceeds from disposition or use of the land, including without limitation, mining activities in accordance with Section 4 of the Treaty of Ruby Valley. Plaintiffs are entitled to such an accounting for proceeds from disposition or use of the land.

77. WHEREFORE, Plaintiffs demand judgment for an accounting, and such other and further relief as this Court deems just and proper.

COUNT V

(Breaches of Fiduciary Duties)

78. Plaintiffs repeat and reallege paragraphs 1 through 47 above.

79. Defendant owes fiduciary duties to Plaintiffs with respect to both (i) monies derived or obtained from the Western Shoshone land; and (ii) monies that should have been received or earned by Defendant but were not because of mismanagement of the mineral resources and other resources from the Western Shoshone land.

80. Defendant has breached its fiduciary duties owed to the Western Shoshone Nation with respect to the Western Shoshone Fee Title Land, by mismanaging the land and failing to account for the proceeds and profits of the land.

81. Plaintiffs and the Western Shoshone Nation have suffered damages as a result of the Defendant's breaches of fiduciary duties.

WHEREFORE, Plaintiffs demand compensatory damages of breaches of fiduciary duties, and such other and further relief as this Court deems just and proper.

DATED THIS 14 day of July, 2005.

Respectfully submitted,

HERMAN & MERMELSTEIN, P.A.
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By:/s/ Jeffrey M. Herman
Jeffrey M. Herman, Esquire
Stuart S. Mermelstein, Esquire
Adam D. Horowitz, Esquire

APPENDIX H

Solicitor – Indian Affairs

Acting Director, Office of Trust Responsibilities – BIA

November 1975

Land Status, Western Shoshone Indians

Enclosed is a copy of a letter from Mr. Tom Delahanty, Jr., Lynbrook, New York forwarded to us for consideration by Senior James Buckley.

Mr. Delahanty refers to the Treaty of 1863 with the Western Shoshone and alleges that the land was never taken legally by the United States, so therefore the land is still theirs. Also they have the right to hunt on the lands referred to.

Our review of the treaty and Executive Orders indicates that Mr. Delahanty is correct. It is requested that a review of the matter be conducted by your office to determine land ownership and the hunting and fishing rights of the Western Shoshone Indians.

Your prompt attention to this matter will be appreciated.

William L. Benjamin

Enclosure

[EXHIBIT 2]

Supreme Court, U.S.
FILED
NOV 2 1 2008
OFFICE OF THE CLERK

No. 08-231

In the Supreme Court of the United States

SOUTH FORK BAND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' action to set aside a 1977 judgment of the Indian Claims Commission (ICC) was properly dismissed on the ground that it was not filed "within a reasonable time" under Rule 60(b) of the Rules of the Court of Federal Claims.

2. Whether the Treaty of Ruby Valley, Oct. 1, 1863, United States-Western Shoshone, 18 Stat. 689, in which the Western Shoshone agreed to provide access to certain lands in exchange for payment, recognized fee title in the Western Shoshone.

3. Whether petitioners' claims arising from the same land claims resolved by the ICC's final judgment are barred by the finality provision of Indian Claims Commission Act, ch. 959, § 22, 60 Stat. 1055 (25 U.S.C. 70u (1976)).

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is not published in the *Federal Reporter* but is reprinted in 279 Fed. Appx. 980. The opinion of the Court of Federal Claims (Pet. App. 18a-41a) is reported at 73 Fed. Cl. 59.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 2008. The petition for a writ of certiorari was filed on August 20, 2008. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, tribes and bands of the Western Shoshone, filed suit in the United States Court of Federal

Claims to invalidate a 1977 Indian Claims Commission (ICC) judgment awarding compensation for the taking of the Western Shoshone's aboriginal lands. In the alternative, petitioners alleged that they are entitled to prejudgment interest and additional relief under an 1863 treaty between the United States and the Western Shoshone, which they claimed recognized their fee title, as opposed to aboriginal title, in the lands. The Court of Federal Claims dismissed the suit for lack of subject matter jurisdiction and for failure to state a claim. The court of appeals affirmed. Pet. App. 1a-17a.

1. In the Indian Claims Commission Act (ICCA), ch. 959, 60 Stat. 1049 (25 U.S.C. 70 *et seq.* (1976)), Congress created the Indian Claims Commission (ICC or Commission) to hear a broad range of historical Indian claims against the United States, including claims relating to the taking of land, and to dispose of such claims "with finality." *United States* v. *Dann*, 470 U.S. 39, 45 (1985) (internal quotation marks and citation omitted).

Under Section 12 of the ICCA, any claim existing as of the date of the ICCA's enactment on August 13, 1946, had to be presented to the ICCA within five years of that date. 60 Stat. 1052 (25 U.S.C. 70k (1976)). A claim "existing before such date but not presented within such period" could not "thereafter be submitted to any court or administrative agency for consideration, nor * * * thereafter be entertained by Congress." *Ibid.*[1] Under Section 22 of the Act, payment of a claim under the ICCA discharged the United States' liability and barred any further claims "arising out of the matter involved in the controversy." 60 Stat. 1055 (25 U.S.C. 70u (1976)).

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[1] The Court of Federal Claims has jurisdiction over claims brought by an Indian group against the United States accruing after August 13, 1946. 28 U.S.C. 1505.

As originally enacted, Section 23 of the ICCA provided for the ICC to complete its work and dissolve by 1956. 60 Stat. 1055. Section 23 was subsequently amended several times to extend that date, with the final amendment providing for dissolution of the Commission by September 30, 1978. Act of Oct. 8, 1976, Pub. L. No. 94-465, § 2, 90 Stat. 1990. Upon dissolution of the ICC, jurisdiction over all pending cases was transferred to the Court of Claims. *Ibid.*

2. The Western Shoshone are the aboriginal inhabitants of lands in parts of present-day Idaho, Utah, Nevada, and California. Pet. App. 2a. In 1863, the Western Shoshone entered into a treaty with the United States in which they agreed to allow travel across, and access to the natural resources within, the country they "claimed and occupied," in return for payment. That treaty, known as the Treaty of Ruby Valley, Oct. 1, 1863, United States-Western Shoshone, 18 Stat. 689, is one of five similar treaties that the United States entered in 1863 with various groups of Shoshone Indians. See Pet. App. 2a-3a; *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 340-343 (1945). After the treaties were adopted, the United States treated the Shoshone territory covered by the Treaty of Ruby Valley and the other 1863 treaties "as a part of the public domain." *Id.* at 346; see also *ibid.* ("School lands were granted. National forests were freely created. The lands were opened to public settlement under the homestead laws.") (citations omitted).

3. In 1951, a number of tribes and bands of the Shoshone Nation, including petitioner Te-Moak Tribe of Western Shoshone Indians, filed a joint petition in the ICC seeking compensation for the alleged taking of more than 80 million acres of land located in California,

Colorado, Idaho, Nevada, Utah, and Wyoming. *Shoshone Tribe of Indians of the Wind River Reservation* v. *United States* (*Shoshone Tribe*), 11 Indian Cl. Comm'n 387, 419 (1962);[2] see *Dann*, 470 U.S. at 41-42. The lands for which the petitioners sought compensation included the lands described in the Treaty of Ruby Valley. *Shoshone Tribe*, 11 Indian Cl. Comm'n at 397. The Shoshone based their claims on aboriginal title as well as on title allegedly recognized under the Treaty of Ruby Valley and the other 1863 treaties. *Id.* at 419; see *Dann*, 470 U.S. at 41; see also *Western Shoshone Nat'l Council* v. *Molini*, 951 F.2d 200, 203 (9th Cir. 1991), cert. denied, 506 U.S. 822 (1992).[3]

In 1962, the ICC found that aboriginal title to the Shoshone lands had been taken by gradual encroachment by settlers and others, as well as by the United States' taking of land for its own use and for use by citizens. *Shoshone Tribe*, 11 Indian Cl. Comm'n at 387-416;

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[2] The decisions of the ICC are available at *Indian Claims Decisions* (visited Nov. 20, 2007) <http://digital.library.okstate.edu/icc>.

[3] An Indian tribe establishes aboriginal title by showing that it has inhabited the land "from time immemorial." *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985). Aboriginal title is "a right of occupancy which the sovereign grants and protects against intrusion by third parties." *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279 (1955). That "right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Ibid.*

By contrast, "[w]here the Congress by treaty or other agreement" has recognized a tribe's title to land, aboriginal title is converted to "treaty" or "fee" title, and "compensation must be paid for subsequent taking." *Tee-Hit-Ton Indians*, 348 U.S. at 277-278. While "[t]here is no particular form for congressional recognition of Indian right of permanent occupancy," this Court has held that fee title requires a finding of a "definite intention by congressional action or authority to accord legal rights, not merely permissive occupation." *Id.* at 278-279.

see *Dann*, 470 U.S. at 41-42. With respect to the Western Shoshone specifically, the ICC found that title to approximately 22 million acres in Nevada and 2 million acres in California had been extinguished in the latter part of the 19th century. *Shoshone Tribe*, 11 Indian Claims Comm'n at 413-414. The ICC also found that the Western Shoshone formed an identifiable group distinct from other groups of the Shoshone Nation and that the Te-Moak Bands had the right to maintain the action on behalf of the Western Shoshone. *Id.* at 434-436, 466. The ICC severed the Western Shoshone's claims from the other claims filed by the Shoshone Nation, requiring the Te-Moak Bands to file a separate amended petition. See Pet. App. 4a.

For purposes of calculating compensation, the government and the Western Shoshone stipulated that all Western Shoshone lands had been taken by July 1, 1872. See *Western Shoshone Identifiable Group* v. *United States*, 29 Indian Cl. Comm'n 5, 7 (1972). Following a trial on valuation, the ICC determined the value of the property taken from the Western Shoshone as of 1872 to be approximately $26 million, including $4.6 million for minerals extracted from the Nevada land before the date of the taking. *Id.* at 57-58.

In 1974, as the ICC proceedings were nearing completion, the Western Shoshone Legal Defense and Education Association, an unincorporated group of Western Shoshone Indians, petitioned to stay the proceedings and file an amended claim. *Western Shoshone Identifiable Group* v. *United States*, 35 Indian Cl. Comm'n 457 (1975). The Association contended that the Western Shoshone's lands were never taken, attempted to repudiate all sums that the ICC found owing to the Western Shoshone, and argued that the Western Shoshone still held

legal title to the property. See *id.* at 460. The ICC dismissed the Association's petition, concluding that the Te-Moak Bands adequately represented the Western Shoshone and that the Association's petition was untimely. *Id.* at 477. The Court of Claims affirmed. *Western Shoshone Legal Def. & Educ. Ass'n* v. *United States*, 531 F.2d 495, 498 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976).

Shortly thereafter, the Te-Moak Band itself attempted to change its position in the ICC proceedings in order to assert claims of continued ownership of the claimed acreage on behalf of the Western Shoshone. As part of that effort, the Te-Moak Band discharged its prior counsel and retained new counsel, who moved for a stay of proceedings in the ICC. The ICC denied the stay, concluding that "it is too late in the litigation for the Commission to be asked to stay proceedings in order to permit the adjudication of the case on a new theory," and the ICC entered final judgment. *Western Shoshone Identifiable Group* v. *United States*, 40 Indian Cl. Comm'n 305, 307-310 (1977); *id.* at 452. The Court of Claims affirmed the award. *Temoak Band of W. Shoshone Indians*, 593 F.2d 994 (Ct. Cl.), cert. denied, 444 U.S. 973 (1979). The Clerk of the Court of Claims certified the ICC's final award to the General Accounting Office on December 6, 1979, which resulted in the automatic appropriation of the amount of the award into an interest-bearing trust account for the Western Shoshone in the Treasury of the United States. *Dann*, 470 U.S. at 42.[4]

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[4] In 2004, Congress enacted legislation providing for the distribution of the ICC award from the trust account. Western Shoshone Claims Distribution Act (Distribution Act), Pub. L. No. 108-270, 118 Stat. 805. In 2007, the Secretary issued final regulations establishing an enroll-

4. In 2003, petitioners, along with other Western Shoshone groups, filed a complaint in the United States District Court for the District of Columbia. In their complaint, plaintiffs sought to quiet title in the Western Shoshone to land identified in the Treaty of Ruby Valley; a declaration that the ICC's judgment on the Western Shoshone's claims is void; interest and royalties for the use of the land; and an accounting. The district court transferred the quiet-title claims to the District of Nevada and the remaining claims to the Court of Federal Claims. *Western Shoshone Nat'l Council* v. *United States*, 357 F. Supp. 2d 172, 177 (D.D.C. 2004).[5]

Petitioners and the other plaintiffs then filed a five-count Second Amended Complaint in the Court of Federal Claims. Pet. App. 65a-81a. In Count 1, plaintiffs sought a declaration that the 1977 ICC judgment on the Western Shoshone's claims is void because it was rendered in violation of the Western Shoshone's due process rights. *Id.* at 75a-77a. Specifically, Count 1 alleged that the Western Shoshone were "denied adequate procedural protections," in that they were denied "their counsel of choice" and the opportunity "to change or withdraw their claim," and "their interests were not represented for purposes of Constitutional due process."

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ment process to allow individuals to file applications to obtain a share of the Western Shoshone judgment fund. *Preparation of Rolls of Indians*, 72 Fed. Reg. 9836. After the submission of applications and establishment of the judgment roll, the Secretary will make a per capita distribution of the fund to the individuals listed on the judgment roll. Distribution Act § 3(c)(1), 118 Stat. 806.

[5] The district court in Nevada dismissed the quiet-title claims as barred by the Quiet Title Act's 12-year statute of limitations. *Western Shoshone Nat'l Council* v. *United States*, No. 04-702, 2006 WL 1663569 (D. Nev. June 7, 2006), aff'd, 274 Fed. Appx. 573 (9th Cir.), cert. denied, 129 S. Ct. 258 (2008).

Id. at 76a. In Count 2, plaintiffs alleged, in the alternative, that if the ICC's judgment was valid, they were entitled to an additional $14 billion in prejudgment interest for the extinguishment of fee title, in addition to the extinguishment of their aboriginal title. *Id.* at 77a-78a; see note 3, *supra* (discussing difference between aboriginal title and fee title). Count 3 sought mining royalties and other compensation under the Treaty of Ruby Valley. *Id.* at 78a-79a. Count 4 sought an accounting "of the proceeds from disposition or use of the land" under the Treaty. *Id.* at 79a-80a. Count 5 sought damages for the United States' alleged breach of fiduciary duties under the Treaty. *Id.* at 80a-81a.

The Court of Federal Claims granted the government's motion to dismiss the complaint. Pet. App. 18a-41a. The court dismissed Count 1, which sought to set aside the ICC judgment as void, on the ground that Rule 60(b) of the Rules of the Court of Federal Claims (RCFC) requires that motions to set aside judgments be brought "within a reasonable time," and plaintiffs had failed to show that their 24-year delay in challenging the ICC award after the Court of Claims certified payment in 1979 was "reasonable." *Id.* at 23a-24a. In the alternative, the court held that Count 1 failed to state a claim under Rule 60(b)(4) because the Western Shoshone had failed to raise any ground for setting aside the judgment that had not already been considered and rejected by federal courts in prior litigation. *Id.* at 28a-29a.

As to Count 2, the court rejected plaintiffs' argument that, under the Treaty of Ruby Valley, they held fee title that would entitle them to prejudgment interest on the ICC's award. Pet. App. 29a-33a. The court concluded that the Treaty of Ruby Valley contained no "specific acknowledgment of Indian title or right of occupancy."

Id. at 32a (quoting *Northwestern Bands*, 324 U.S. at 348).

The court dismissed Count 3, seeking royalties under the Treaty of Ruby Valley, on the ground that the claim was within the exclusive jurisdiction of the ICC and barred by the finality provision of the ICCA. Pet. App. 33a-37a. The court dismissed Count 4, seeking an accounting under the Treaty of Ruby Valley, on the ground that an accounting is available only where the defendant's liability has been established. *Id.* at 37a-38a. Finally, the court dismissed Count 5, alleging a breach of fiduciary duty under the Treaty of Ruby Valley, as barred by the six-year statute of limitations applicable to claims brought in the Court of Federal Claims. *Id.* at 38a-40a; see 28 U.S.C. 2501. The court reasoned that, even if the United States had owed the Western Shoshone a fiduciary duty, the Western Shoshone were put on notice of the United States' repudiation of any such duty in the 1950s when, in the ICC proceedings, the United States denied that the Western Shoshone had any interest in any of the disputed lands. *Id.* at 39a-40a.

5. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-17a.

First, the court of appeals agreed with the Court of Federal Claims that the Western Shoshone's request in Count 1 to set aside the ICC judgment, some 24 years after the Court of Claims certified the award for payment, was not brought "within a reasonable time" as required under RCFC 60(b). Pet. App. 9a-12a.

Turning to Count 2, the court of appeals noted that this Court had rejected a similar argument for recovery for the taking of fee title based on the Treaty of Box Elder, July 30, 1863, United States-Northwestern Shosho-

nee, 13 Stat. 663, a treaty between the United States and the Shoshone that was "similar in form" to the Treaty of Ruby Valley. Pet. App. 13a-14a (quoting *Northwestern Bands*, 324 U.S. at 343). The court further concluded that, while the Treaty of Ruby Valley acknowledged the Western Shoshone's right to continue occupying identified lands, nothing in the treaty "suggests that the [United States] intended to convey title to the Western Shoshone," and that "the United States' actions after adopting the Treaty are inconsistent with an interpretation that the Treaty of Ruby Valley conveyed title." *Id.* at 14a.

Finally, the court of appeals held that Count 3 (for royalties under the Treaty), Count 4 (for an accounting under the Treaty), and Count 5 (for breach of fiduciary duty under the Treaty) were barred by Section 22 of the ICCA, 60 Stat. 1055 (25 U.S.C. 70u (1976)), which provides that a final determination of the ICC bars any further claims arising from the same matter, and thus were properly dismissed for lack of subject matter jurisdiction. Pet. App. 15a-17a.

ARGUMENT

The court of appeals correctly affirmed the dismissal of petitioners' complaint, which seeks to relitigate issues that were conclusively decided decades ago. The court's unpublished decision does not warrant further review.

1. Petitioners' primary contention (Pet. 12-19) is that the court of appeals erred in affirming the dismissal of Count 1 of their Second Amended Complaint, which seeks to set aside the 1977 judgment of the ICC as void under RCFC 60(b)(4) on the ground that the ICC proceedings did not comport with due process. Petitioners' contention lacks merit.

RCFC 60(b)(4) provides that, "[o]n motion and upon such terms as are just," the Court of Federal Claims may relieve a party from a final judgment that is "void." Any motion to set aside a final judgment under Rule 60(b) must, however, "be made within a reasonable time."[6] In this case, the Western Shoshone sought Rule 60(b)(4) relief some 24 years after the Court of Claims certified the ICC's award for payment. Pet. App. 10a, 24a. As the court of appeals correctly concluded, "[t]wenty-four years is not a reasonable time to have waited to challenge the Court of Claims' affirmance." *Id.* at 10a.

Petitioners argue (Pet. 14-15) that the court of appeals' application of the "reasonable time" requirement under RCFC 60(b)(4) conflicts with decisions of other courts of appeals that have held that motions for relief from a void judgment under the parallel provision of the

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[6] At the time the suit was filed, Rule 60(b) provided, in relevant part: On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under RCFC 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

RCFC 60(b) (2002). The Rules of the Court of Federal Claims were amended on November 3, 2008. Those amendments do not, however, affect any issue in this case.

Federal Rules of Civil Procedure are not subject to a "reasonable time" requirement. Petitioner is correct that other courts have stated that, notwithstanding the language of the rule, no time limits apply to a Rule 60(b)(4) motion to set aside a void judgment. See, *e.g.*, *New York Life Ins. Co.* v. *Brown*, 84 F.3d 137, 142-143 (5th Cir. 1996); *Orner* v. *Shalala*, 30 F.3d 1307, 1310 (10th Cir. 1994). But see *Days Inns Worldwide, Inc.* v. *Patel*, 445 F.3d 899, 905-906 & n.7 (6th Cir. 2006) (affirming denial of Rule 60(b)(4) motion on the ground that it was not filed within a reasonable time, but noting that a different result might obtain had the movant challenged the court's subject-matter jurisdiction, since "objections to subject-matter jurisdiction may not be waived or forfeited"); *Beller & Keller* v. *Tyler*, 120 F.3d 21, 24 (2d Cir. 1997) (noting that, although "[c]ourts have been exceedingly lenient in defining the term 'reasonable time,' with regard to voidness challenges," where a party has previously filed a Rule 60(b) motion to set aside a default judgment without raising voidness arguments, a later Rule 60(b)(4) motion would be untimely); *State Street Bank & Trust Co.* v. *Inversiones Errazuriz Limitada*, 374 F.3d 158, 178 (2d Cir. 2004) (affirming denial of Rule 60(b)(4) motion as untimely under similar circumstances), cert. denied, 543 U.S. 1177 (2005).

This case does not, however, present a suitable opportunity for this Court to resolve any tension among the courts of appeals as to whether a motion under Rule 60(b)(4) of the Federal Rules of Civil Procedure must be filed within "a reasonable time." As a preliminary matter, the court of appeals' decision is unpublished, and, by its terms, it interprets the Rules of the Court of Federal

Claims, rather than the Federal Rules of Civil Procedure.

In any event, even if petitioners' claim were not subject to the "reasonable time" limitation of RCFC 60(b), the claim would nevertheless fail. As the Court of Federal Claims noted (Pet. App. 28a-29a), courts have previously considered and rejected the substance of petitioners' claim of error (see Pet. 16-19): that the ICC's judgment was "tainted" by the alleged refusal of the government to allow the Western Shoshone to change counsel—and more fundamentally, the ICC's refusal to allow the Western Shoshone to change their litigating position—in the final stages of a proceeding that had begun decades earlier. See *Temoak Band of W. Shoshone Indians* v. *United States*, 593 F.2d 994, 998 (Ct. Cl.) ("The abandonment of an entire claim at any point with prejudice may well be a claimant's right, but the partial and contingent abandonment of it, after 25 years, without prejudice, when the goal of final adjudication is in sight cannot be."), cert. denied, 444 U.S. 973 (1979); see also *Western Shoshone Legal Def. & Educ. Ass'n* v. *United States*, 531 F.2d 495, 498 (Ct. Cl.), cert. denied, 429 U.S. 885 (1976). There is no reason for a different result here. And to the extent that petitioners allege that the government's alleged refusal to allow the Te-Moak Band to change counsel independently states a due process violation, that allegation is belied by the fact that the Te-Moak Band's chosen counsel represented the Te-Moak Band before the Court of Claims. See *Temoak Band*, 593 F.2d at 997.

2. Petitioners next contend (Pet. 19-25) that the court of appeals erred in holding that the Treaty of Ruby Valley did not confer fee title on the Western Shoshone, and that the Western Shoshone are therefore not

entitled to prejudgment interest on the ICC's award. Petitioners' contention lacks merit, and it does not warrant this Court's review.

As the court of appeals correctly recognized (Pet. App. 13a-14a), this Court's decision in *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335 (1945), forecloses petitioner's argument. In *Northwestern Bands*, various Shoshone groups sought to recover damages for the taking of lands as to which they held aboriginal title, alleging that the United States had recognized their title in the 1863 Treaty of Box Elder. See *id.* at 336. Like the Treaty of Ruby Valley, the Treaty of Box Elder was one of the five treaties of peace and amity negotiated between the Shoshone and the United States after a period of conflict, "to clear up the difficulties in the Shoshone country." 324 U.S. at 341-342. After reviewing the Treaty of Box Elder "and the others which were entered into with the other Shoshone tribes," the Court rejected the Northwestern Bands' claim to fee title. *Id.* at 347. The Court explained:

> Nowhere in any of the series of treaties is there a specific acknowledgment of Indian title or right of occupancy. It seems to us a reasonable inference that had either the Indians or the United States understood that the treaties recognized the Indian title to these domains, such purpose would have been clearly and definitely expressed by instruction, by treaty text or by the reports of the treaty commissioners, to their superiors or in the transmission of the treaties to the Senate for ratification.

Id. at 348. As the court of appeals correctly held in this case, the Court's "reasoning and conclusions cover the Treaty of Ruby Valley," as well as the other 1863 trea-

ties between the Shoshone and the United States. Pet. App. 14a.

Petitioners (Pet. 22-25) attempt to distinguish the Treaty of Ruby Valley from the Treaty of Box Elder on the ground that the Senate had amended the latter treaty to include the following provision:

> Nothing herein contained shall be construed or taken to admit any other or greater title or interest in the lands embraced within the territories described in said treaty in said tribes or bands of Indians than existed in them upon the acquisition of said territories from Mexico by the laws thereof.

Northwestern Bands, 324 U.S. at 344. According to petitioners, that provision "would seem to foreclose the recognition of title." Pet. 22. And because the Treaty of Ruby Valley "did not contain th[at] determinative language," petitioners argue, "[i]t may be inferred" that "the intent was to convey recognized title." Pet. 23.

When the *Northwestern Bands* Court considered the Senate amendment to the Treaty of Box Elder, however, it neither understood the language of the amendment broadly to "foreclose the recognition of title," nor otherwise suggested that it was "determinative" of the question whether title had been recognized. By its terms, the amendment foreclosed only "*any other or greater* title or interest" than existed in the tribes or bands "upon the acquisition of said territories from Mexico," 324 U.S. at 344 (emphasis added); it did not, as petitioners would have it, "state[] expressly that title was *not* conveyed" at all, Pet. 23. Indeed, the petitioners in *Northwestern Bands* cited the amendment as evidence *in favor* of the proposition that the treaty recognized title to the described lands, arguing that, "'if the treaty recognized no rights,'" the provision limiting the recog-

nition of title to lands contained within the Mexican Cession would have been unnecessary. 324 U.S. at 351. The Court rejected the argument, reasoning that the Senate had particular reason to act cautiously with respect to questions concerning title to lands within the Mexican Cession. See *id.* at 351-353. But in concluding that the Senate amendment did not *undermine* its conclusion that the Treaty of Box Elder did not recognize title in the Northwestern Bands, the Court never suggested that the Senate amendment *demanded* that conclusion. *Ibid.*

Petitioners (Pet. 22-23) also attempt to distinguish *Northwestern Bands* on the ground that the question in that case concerned aboriginal title, rather than recognized title. Petitioners are mistaken. See *Northwestern Bands*, 324 U.S. at 339 ("In this case * * * the success of the claim depends not upon proof of the Indian title, which may be admitted, but upon recognition of that title by the Box Elder treaty.") (citation omitted); *id.* at 340 ("The decisive question in this case is whether it was intended by the Northwestern Shoshone or Box Elder Treaty of July 30, 1863, to recognize or acknowledge by implication the Indian title to the lands mentioned in the treaty.").

Moreover, even if petitioners' claim for prejudgment interest were not otherwise foreclosed, it is in any event barred by Section 22 of the ICCA, because it "aris[es] out of the matter involved in the controversy" before the ICC. 60 Stat. 1055 (25 U.S.C. 70u(b) (1976)).

3. Finally, petitioners contend (Pet. 26-30) that the court of appeals erred in dismissing Counts 3, 4, and 5 of their complaint on the ground that they are barred by Section 22 of the ICCA. According to petitioners, Section 22 did not survive the dissolution of the ICC in 1978,

was therefore no longer in effect in 1979 when the Court of Claims certified the ICC's award for payment, and thus has no application in this case. That contention also lacks merit.

As the Court of Federal Claims correctly explained, when Congress provided for the ICC's termination in 1978, Congress did not repeal any provision of the ICCA, and "[t]here is nothing in the history of the ICCA to indicate that it has ever been repealed." Pet. App. 36a. Petitioners do not dispute that conclusion. They contend (Pet. 28, 29), however, that the ICCA's finality provision was nevertheless a dead letter by the time payment was made in this case because the ICCA, including its finality provision, had been omitted from the United States Code.

Petitioners' argument is both factually and legally incorrect. As a factual matter, the ICCA was not omitted from the Code until 1982; the ICCA, including its finality provision, continued to appear in the Code as of 1979, when the Court of Claims certified the ICC's award. But more fundamentally, that the ICCA has been omitted from subsequent editions of the United States Code does not mean that the ICCA is no longer in force. Unless a title of the Code has been enacted into positive law, the content of that title provides only "prima facie" evidence of the content of the laws of the United States, 1 U.S.C. 204(a), while the Statutes at Large provides the "legal evidence of laws," 1 U.S.C. 112. Thus, even though a statutory provision may have been omitted from the Code, it "remains on the books if the Statutes at Large so dictates." *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 448 (1993). The ICCA appeared in Title 25 of the Code, a title that has not been enacted into positive law.

And petitioners point to nothing in the Statutes at Large indicating that Congress, as opposed to the codifier, intended to erase the ICCA from the books once the ICC dissolved. See Pet. 27-29.

In any event, even if petitioners' claims were not barred by the finality provision of the ICCA, they would nevertheless be barred by 28 U.S.C. 2519, which similarly forbids claims arising from matters adjudicated by the Court of Claims, see *United States* v. *Dann*, 470 U.S. 39, 45 n.10 (1985), as well as Section 12 of the ICCA, which gave the ICC exclusive jurisdiction to hear Indian claims that arose before August 13, 1946, and required that all such claims be presented before August 13, 1951, or forever relinquished, see 60 Stat. 1052 (25 U.S.C. 70k (1976)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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